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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 350

GEORGE BECK, Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner, George Beck, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming the judgment of the United States District Court for the District of Colorado.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Appendix A, *infra*) is not yet reported.

JURISDICTION

The opinion of the Court of Appeals was handed down and judgment entered on May 29, 1962 (R. 6).[1] A timely petition for rehearing was filed on June 8, 1962, and was denied on June 21, 1962 (R. 7, 9). An order staying the mandate of the Court of Appeals for thirty days was entered on June 29, 1962 (R. 9). On July 16, 1962, an order was entered by Mr. Justice White, extending the time for filing a petition for certiorari to August 20, 1962. On July 27, 1962, an order was entered by the Court of Appeals staying its mandate until August 20, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

QUESTIONS PRESENTED

1. Is a Defendant in a criminal case entitled to have the jury instructed as to the legal validity of his defenses when there is substantial evidence to support them and appropriate instructions are tendered?

2. Realistically, under such circumstances, is a Defendant's right to a fair trial, in a criminal case, preserved by anything less than a direct instruction as to the legal effect of his theory of defense, or is it sufficient that a jury

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[1] References are indicated as: "App." — Appendix, this Petition by page number; "R." — Transcript of Record from Circuit Court of Appeals; "T" — Court Reporters Transcript of Trial Proceedings, pages of which are numbered separately from Record.

of laymen be left to decide the question by negative deductions from instructions defining the offense?

STATUTES INVOLVED

Constitution of United States, Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

18 U.S.C. §1341

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives there-

from, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

STATEMENT

This petition involves the sufficiency of instructions given the jury in a criminal mail fraud case under 18 U.S.C., Section 1341.

The Petitioner and several others were indicted in the District Court for the District of Colorado on twelve counts of mail fraud and one count of conspiracy to violate 18 U.S.C., Section 1341, contrary to 18 U.S.C., Section 371. The Petitioner, David R. Tuthill and Charles E. Conklin were tried jointly for the alleged offenses. The Petitioner was convicted on four counts of mail fraud, acquitted on eight counts and acquitted of the conspiracy charge. Co-Defendant Tuthill was convicted on twelve counts of fraud and acquitted of the conspiracy charge. (App. 2.)

The prosecution arose out of the conduct of a business venture in which the Defendants were involved. In 1952, the Petitioner, a former mathematics teacher at the University of Colorado, became the official importer to the United States and Canada for an Austrian-made hand knitting machine. In May of 1957, the Petitioner and Tuthill organized the California Sportswear Corporation of Colorado, which proceeded to sell the knitting machines

under a program whereby the corporation would agree to furnish yarn to the purchasers at cost and would repurchase knitted garments made on the machines at twice the price of the yarn. (App. 2-3.)

The indictment charged the Petitioner, together with others, with devising and intending to devise a scheme and artifice to defraud and to obtain money by false and fraudulent pretenses, promises and representations from a class of persons in and around Denver. The indictment further charged as parts of the scheme, that the California Sportswear Corporation of Colorado was incorporated May 24, 1957; that advertisements were placed in newspapers offering employment to a limited number of women in their homes on a part-time basis; that financing of the purchase of the knitting machines was to enable the corporation to be paid for the purchase of the same; that the corporation permitted the persons to be defrauded to produce items relatively easy to make for a few months and then required such persons to manufacture only items which were difficult to make; that purchasers of the machines were deceitfully induced to believe that the primary business of the company was the distribution and sale of knitted garments produced by the purchasers of the machines; and that the United States mails were used in specific instances to execute such scheme. (App. 4-5.)

It was charged that in furtherance of the scheme, certain false representations were made by the Defendants with respect to the nature of the business, the earnings which might be expected by purchasers of the machines, the length of time that would be required to make certain articles, and that the number of women selected for work with the corporation would be limited. (App. 5-6.)

At the trial, which continued from November 23 through December 8, 1960, the Government introduced testimony of forty-nine witnesses and entered one hundred fifty-four exhibits into evidence. Most of the witnesses testifying for the Government were women who had contracted to purchase knitting machines. Their testimony was generally to the effect that they had not realized as much from knitting with the machines as they had expected, that they had had difficulty in obtaining yarn from the corporation and in making and selling some of the garments which they had been asked to make. They also testified concerning alleged misrepresentations which had been made to them by representatives of the company. Only one witness testified with respect to direct dealings with the Petitioner and her testimony contained nothing to show misrepresentations (T. 40-43, 59-62, 83-84). Thirty-two other witnesses were permitted to testify, over the objections of the Petitioner, to representations made to them by representatives of the company, without any showing of authority, knowledge or ratification by the Petitioner. Twenty-five of these witnesses were permitted to testify concerning events which occurred after the Petitioner was no longer active in the corporation. There was also evidence introduced to show that the mails were used by the corporation.

The Petitioner raised several defenses to the charges, some in common with the other Defendants and some peculiar to himself. Among the defenses raised by the Petition were the following: that he had acted in good faith and had honestly believed the representations which he made or had knowledge of; that if there was a scheme to defraud the machine purchasers as alleged, it had been devised and consummated after he had severed his rela-

tionship with the business operation; and that if any fraudulent misrepresentations were made, they were made without his knowledge or consent and were unauthorized by him.

At the trial, the Petitioner undertook to prove facts in support of the above defenses:

To prove the defense of good faith, the Petitioner testified as to his good intentions and belief in the feasibility of the plan for the business (T. 1104), that he had investigated a similar operation and found it to be operating successfully (T. 1103, 1118), that he made a market test with respect to the knitted garments prior to initiating the business (T. 1105, 1107), and that, while he was actively associated with the business, he had accepted the return of machines from purchasers who did not feel they could continue (T. 1116). To further support the defense of good faith, the Petitioner's testimony showed that he had consulted an attorney prior to initiating the business (T. 1107, 1108, 1149), and that he had cautioned representatives of the company to be cautious in the statements they made and to refrain from overselling the plan (T. 1152). This testimony was substantiated by the testimony of other witnesses (T. 938, 943, 930-31, 933, 1511, 1516, 1517). A representative of the Better Business Bureau, who was called as a Government witness, testified that the Petitioner had contacted that agency prior to initiating the business and that he had kept it advised as to the company's operations. (T. 937-944).

To prove the defense that he had severed connection with the operation prior to the commission of any fraudulent acts, the Petitioner introduced evidence to show that

he had substantially severed connections with the operation in January of 1958 and that the activities complained of had occurred after that date. (T. 1131-1139, 998.)

Finally, by cross examination and direct evidence, the Petitioner attempted to prove that any fraudulent representations made by salesmen and agents had been made without his knowledge, consent or ratification.

After the evidence was in, the Petitioner requested jury instructions be given regarding the legal validity of the defenses which he had raised and attempted to prove.

On the defense of "good faith", the Court was requested to instruct the jury that under the law good faith and honest belief that the representations made were true, was a complete defense to the charges; that the fact that the Defendants acted under the advise of a lawyer should be considered in determining their good faith; and that impracticability of a business plan, in itself, does not constitute fraud. These instruction were refused. (App. 51, 53, 54, 55.)[2]

On the question of severing his relationship with the operation, the Petitioner requested an instruction that under the law, a Defendant who effectively terminates his connection with an operation which later becomes fraudulent, is not guilty of fraud. Such instructions were refused (App. 52).

Finally, the Petitioner repeatedly, but unsuccessfully,

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[2] For the Court's convenience the instructions tendered by the Petitioner and refused by the District Court have been printed as Appendix C to this Petition. They are found in the Transcript of Record at pp. 1899-1909. The instructions given by the District Court have been printed at App. 16-46.

objected to introduction of evidence of representations made by salesmen without a showing of ratification or authorization, and requested the judge to instruct the jury to disregard all evidence which had not been connected to him by evidence of authorization or ratification. The Court refused to so instruct the jury (T. 95, 99, 110, 111, 120, 121, 125, 126, 1083, 1084).

On appeal to the Tenth Circuit, the Petitioner again raised the sufficiency of the instructions. On the question of good faith, the Court recognized that good faith is a valid defense and that a defendant is entitled to jury instructions on his theory of defense, but held that the jury had been made aware of the defense by a general instruction that the Defendants denied the charges and claimed they had acted honestly and in good faith, and by certain language used in instructions defining "willfully" and "intent to defraud" (App. 8-10).

Regarding Petitioner's claim that the tendered instruction on withdrawal should have been given, the Court of Appeals held that this contention was "answered by the verdict returned by the jury." (App. 14, 15).

Finally, on the question of authorization or ratification of the fraudulent statements complained of, the Court of Appeals held that other evidence was a sufficient foundation for the inference of authorization. The Court did not indicate that the requested instruction was legally erroneous. (App. 10-14.)

REASONS FOR GRANTING THE WRIT

This case deals with one of the most basic and fundamental rights which can be claimed by any defendant in a criminal case — the right to have the jury instructed as to the legal validity of his defenses. Decisions of this Court (e.g. *Bird vs. United States*, 180 U.S. 356; *United Brotherhood, etc. vs. United States*, 330 U.S. 395, 409; *Pierce vs. United States*, 314 U.S. 306, 62 S.Ct. 237); decisions of other Courts of Appeals (e.g. *Marson v. United States*, 203 F.2d 904 (CA 6th); *Levine vs. United States*, 261 F.2d 747 (D.C.Cir.); *Calderon vs. United States*, 279 Fed. 556 (CA 5th), and even earlier decisions of the Court of Appeals for the Tenth Circuit (e.g. *Little vs. United States*, 73 F.2d 861), define and apply this principle, holding that failure to give such requested instructions is reversible error. Under the above authorities the only prerequisite necessary to claim this right is that there be a sufficient quantum of evidence introduced in the record to give a reasonable factual basis for the defense. The presence of such evidence in the present case is admitted by the Court of Appeals (App. 9).

The exact source of the right to have the jury specifically instructed on the legal validity of defenses raised by a defendant is rarely articulated. Undoubtedly, it derives from the Constitutional guaranty of a fair trial found in the Due Process Clause of the Fifth Amendment and our long history of safeguarding all defendants from unjust conviction. But regardless of the source, the decisions of this Court leave little room for doubt that if there is evidence to reasonably support a defense, the defendant is entitled to have the jury specifically instructed as to whether the claimed defense is legally sufficient. For

example, in *Bird vs. United States*, supra; the trial court in a murder case instructed the jury that if they found from the evidence that the defendant shot and killed another, "and that said killing was malicious, premeditated and willful, and that said killing was not in the necessary defense of the defendant's life or to prevent the infliction upon him of great bodily harm," they should find the defendant guilty. The trial court refused to instruct affirmatively, as requested by the defense, that "if the defendant believed, and had reason to believe, that the killing was necessary for the defense of his life or to prevent the infliction upon him of great bodily harm", the jury should find him not guilty. This Court held there was substantial error in the failure to instruct as requested by the defendant and ordered a new trial. The situation in the *Bird* case is directly analagous to the present case. The Court of Appeals, in its decision, cites the *Bird* case (App. 8) as precedent for the proposition that a defendant is entitled to adequate jury instructions on his theory of defense, but overlooked or refused to follow the precise rule enunciated in that case, that to be "adequate", the instructions must state the theory of defense affirmatively and specifically instruct the jury to find the defendant not guilty, if the evidence supports that theory.

In *United Brotherhood, etc. vs. United States*, supra, this Court reasoned that failure to give an instruction on a valid defense is prejudicial because the court is, in effect, depriving the jury of its function — "For a judge may not direct a verdict of guilty, no matter how conclusive the evidence."

In this case, it is clear that the Petitioner raised several valid defenses and introduced evidence on each. Un-

der the above stated rule, he was entitled to have the jury instructed that these were legal and valid defenses requiring acquittal if the substantiating evidence was accepted.

The Court of Appeals paid lip service to the Petitioner's rights, but went on to hold that, for a variety of reasons, the District Court was not required to give specific defense instructions in this case. The Court said no specific instruction on good faith was required because a general instruction was given to the effect that the defendants denied the charges and claimed they acted honestly and in good faith and, additionally, because the elements of willfulness and intent to defraud had been defined so that the jury should have known that good faith and honest belief would prevent conviction (App. 8-10).

The Court did not explain how a mere statement that a defendant *claims* "good faith" can inform the jury that proof of such claim requires acquittal; nor, did it explain how its holding conforms to the Supreme Court rule or even its own rule, as expressed in *Little v. United States*, supra, that:

> "A charge that if the jury fails to find the essentials of the crime charged, there should be an acquittal — the converse of the charge given — puts to the jury the defendant's side of the case and, when requested, should be given."

On the defense of withdrawal before a fraudulent scheme was conceived, the Court did not really discuss the instructions and merely held that Petitioner's contentions "were answered by the verdict returned by the jury."

It did not speculate whether a jury properly instructed on this defense would have answered these contentions in the same manner; nor did it explain how a valid answer could be derived from a verdict inconsistent within itself, holding two defendants separately guilty on each of four counts of fraud, but both innocent on a conspiracy charge predicated on the same overt acts. In thus brushing off the Petitioner's contentions and avoiding proper judicial consideration of the question of law raised by his appeal, the Court assumes that the jury, even with the instructions requested, should have found the Petitioner criminally liable for all acts of the officers and employees of the corporation until he had sold all of his stock in the corporation (App. 14, 15). It is submitted that no such vicarious criminal liability attaches to a mere stockholder. There was evidence to show that Petitioner went to Europe in January, 1958, and that he took no active part in the operation of the company after that time and had no control over the officers and employees (T. 998, 1133-1138). There was a very real question as to whether Appellant was ever a member of an unlawful conspiracy and, if so, whether, and when, he withdrew. The tendered instruction (App. 52, 53) which was refused, was necessary to point up the question for the jury. Whether the requested instruction was proper or improper, how can the failure to give it be justified by the fact that Appellant was convicted of only four offenses rather than thirteen?

On the defense that any fraudulent misrepresentations were neither authorized nor ratified and that evidence regarding representations made by others was improperly received without specifically being related to the Petitioner, the Court again recited the proper rule of law,

viz., that statements of agents must be expressly or impliedly authorized or ratified, but it failed to discuss why such rule was not given to the jury. Instead, it held that other evidence was sufficient to convict the defendants; that there may have been some implied authority; and that the pattern of the whole operation was a sufficient foundation to permit evidence of agents' misrepresentations. (App. 13-14.)

It is respectfully submitted that in each of these particulars the Court of Appeals sidestepped the real issue of whether an adequate instruction was given on the specific defense raised. The opinion creates the definite impression that the Court of Appeals felt that the Government's evidence was so voluminous that conviction was required, and that somehow this corrected any legal errors in the trial. The Petitioner did not appeal on technical legal grounds, but on the fundamental ground that he was deprived of a fair trial. What possible value can it be to a defendant to introduce factual evidence supporting a defense if the jury is not told clearly and specifically that the defense which is raised is legally valid? A jury does not have the advantage an appellate court has to study a written transcript of instructions and then to make deductions and inferences therefrom. A jury hears the instructions once and the only way to make sure that the jury knows a defense is valid is to explain it in so many words. This is a defendant's safeguard; it is his right. It cannot possibly prejudice the Government to have the jury properly instructed that there are valid legal defenses claimed by the defendant, which, if supported by the evidence, require acquittal. But the refusal to give such in-

structions — no matter what may be inferred from other instructions with the benefit of hindsight — introduces into a criminal trial a distinct possibility of error, misunderstanding and mistake.

This case is important because the Petitioner did not receive a fair trial by a jury specifically and directly instructed on the law relating to his defenses. But even more important is the refusal of the Court of Appeals to recognize this fact and order a new trial, for the opinion in this case will stand as appellate precedent for other trial courts to similarly disregard the rights of other defendants. The decisions of this Court indicate that it is axiomatic that the constitutional rights of our citizens are rarely abolished by a single act or omission, but they are frequently eroded and diluted by neatly drawn distinctions, carefully phrased arguments and unreal, legalistic syllogisms. We earnestly submit that all of these processes are active in this case. If the opinion of the Court of Appeals stands, what once was a constitutional right to have the jury instructed on the legal validity of a defense has been diluted to a right to have the trial judge mention the problem while explaining the elements of the offense. Such a dilution of such a right calls for action by this Court.

This is not a case where as responsible advocates, we can say with certainty that the jury would have acquitted the petitioner if the tendered defense instructions had been given. But we do plead that the only possible way to determine whether a properly and impartially instructed jury would convict this Petitioner is to order a new trial wherein such circumstances will be required. We also

urge that constitutional safeguards in jury trials are only meaningful and enduring when consistently and meticulously applied, without variation or subtle distinction as between those viewed as guilty or innocent by the trial judge or appellate courts.

There cannot be a different standard of fairness in the conduct of a trial of a defendant whose guilt is more obvious from that used for another whose guilt is less apparent. A wrong means to achieve a deserved result finds no sanction in our law. The reasoning employed by the Court of Appeals in affirming the conviction of Petitioner clearly suggests the use of a double standard of justice, under which that Court attempts to justify the failure of the trial court to afford Petitioner the well recognized protections to which he was entitled, because of an apparent conviction in the minds of the appellate judges that the evidence indicated his guilt. The right to a fair trial does not depend upon the degree of culpability disclosed by the evidence — that right can only be preserved by the application of a single standard for all persons brought to trial. The review requested by the Petitioner is to establish, unequivocally, what that standard is.

CONCLUSION

The opinion of the Court of Appeals represents a substantial departure from the established rule in criminal cases which allows a defendant the right to have the jury specifically instructed as to the legal validity of defenses raised in the trial. The decision below directly conflicts with decisions of this Court and other Courts of Appeals and the question raised is one vital to the administration

of criminal justice which can only be resolved by the action of this Court. A writ of certiorari should be issued.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 6852 and 6853 — May Term, 1962

George Beck,
Appellant,

6852 v.

The United States of America,
Appellee.

David R. Tuthill,
Appellant,

6853 v.

The United States of America,
Appellee.

Appeal from the United States District Court for the District of Colorado.

[Filed May 29, 1962]

Russell P. Kramer for Appellant, George Beck; Hugh A. Burns for Appellant, David R. Tuthill;

Yale Huffman, Assistant United States Attorney (Lawrence M. Henry, United States Attorney was with him on the brief) for Appellee.

Before Pickett, Lewis and Hill, United States Circuit Judges.

Hill, Circuit Judge.

The two appellants, George Beck and David R. Tuthill, were indicted along with other defendants in the District of Colorado on Thirteen Counts. The first Twelve Counts charged use of the mails to defraud under 18 U.S.C.A. § 1341 and the last Count of the indictment charged a conspiracy under 18 U.S.C.A. § 371 to violate § 1341. Trial was had to a jury as to Beck, Tuthill and their co-defendant, Conklin. Beck was convicted on Counts One, Two, Three and Four and acquitted on the remaining Counts; Tuthill was convicted on Counts One through Twelve and acquitted on Count Thirteen. We are not concerned here with Conklin.

The prosecution stems from the conduct of a business venture initiated by the appellants.

In 1952, Beck became the exclusive importer to the United States and Canada for an Austrian-made hand knitting machine. For the next five years, the business did not prosper to any great extent. Early in 1957, he learned the details of a business venture in Detroit, Michigan, which combined the selling of hand knitting machines with an agreement for the purchase of garments from those buying the machines. With knowledge of the working of this business, he solicited and obtained the services of Tuthill and together they organized California Sportswear Corporation of Colorado, incorporating the same on May 24, 1957, for the purpose of carrying on a business similar to the Detroit venture. Beck became President and Tuthill Secretary-Treasurer of the Corporation. Beck and Tuthill, with salesmen employed by them, contacted women in the vicinity of Denver to sell the women the knitting machines imported by Beck at prices ranging from $300 to $350 each, with profits to the corporation ranging from $200 to $270 on each machine. The names of the sales

prospects were obtained largely from responses to advertisements placed in various area newspapers. Copies of the written sales presentation and work agreement with the purchasers of the machines and also knitting patterns were procured from the Detroit concern and used in the operation of this business.

The agreement entered into with the purchasers of the machines provided for the sale of yarn by the company to the purchasers at cost and the company agreed to purchase all garments knitted at a price twice the cost of the yarn used.

At no time during the operation of this venture did the corporation or appellants have any substantial demand or outlet for the garments bought from the purchasers of the knitting machines. The evidence does disclose some efforts on the part of appellants to create a market for the sale of these garments. Money from the sale of the machines was used to buy the garments from the machine purchasers.

In the beginning, appellants performed the sales work of the corporation, but in the fall of 1957 salesmen were hired to do this work. Instructions were given these salesmen by appellants and the written sales presentation or "sales pitch" procured from Detroit was put into use.

Late in 1957, differences arose between appellants. Beck resigned as President of the company but remained as Vice-President. His salary was discontinued as of December 31, 1957. Tuthill became President and the co-defendant, Conklin, came into the company as a stockholder and officer. Beck retained stock in the company but left Denver in January, 1958, on a trip to Europe. On this trip he attempted to make sales of the garments at

several places in the United States. In Europe he spent most of his time at the factory where the knitting machines were manufactured and corresponded with Tuthill about the operation during this absence. After Beck's return to Denver in May, 1958, he resigned as Vice-President of the company and sold his stock to Conklin. The sale of all of his stock was consummated in June. The company continued to buy the knitting machines for resale from Beck and for the period from June, 1957, to June, 1959, Beck received a commission of $37 on each of at least 800 knitting machines sold by him or his privately owned company to California Sportswear of Colorado. In addition, he received substantial compensation from California Sportswear of Colorado during the time he was connected with it. Tuthill also received substantial compensation from California Sportswear of Colorado during the existence of the venture.

An example of the newspaper advertisements used to procure prospects is shown by Government's Exhibit 6-B run in the Denver Post on June 30, 1957, which read as follows:

> "Help Wanted (female)
> Ladies work at home. We need 20 ladies to work at home 8-10 hrs. per wk. Earn up to $35 weekly in your spare time. No experience necessary. No selling, canvassing, or telephoning. Call GE 3-0314. California Sportswear Corp."

The indictment charged the two appellants, together with others, with devising and intending to devise a scheme and artifice to defraud and to obtain money by false and fraudulent pretenses, promises and representations from a class of persons in and around Denver. As

a part of the scheme, it is alleged that the California Sportswear Corporation of Colorado was incorporated May 24, 1957; that advertisements were placed in newspapers offering employment to a limited number of women in their homes on a part-time basis; that the financing of the purchase of the knitting machines was to enable the corporation to be paid for the purchase of the same; permitting the persons to be defrauded to produce items relatively easy to make for a few months and then require such persons to manufacture only items which were difficult to make; the realization of a profit of $200 to $270 on each knitting machine sold; and deceitfully inducing the purchasers of the machines to believe that the primary business of the company was the distribution and sale of knitted garments produced by the purchasers of the machines; and that the United States mails were used in specific instances to execute such scheme.

In furtherance of the scheme, the following false representations are alleged to have induced the purchase of the knitting machines: That the corporation was doing business primarily as a wholesaler and jobber of knitted garments and that the sale of the knitting machines was incidental; that the corporation had a large and expanding market for the knitted garments and needed quantities of the garments to fill existing orders; that the women could make a profit of $10 to $50 per week from knitting with a minimum of 15 hours work per week; that four or five hours of knitting per week would be sufficient to meet the monthly payments on the machine purchased; that the corporation would purchase for three years all garments knitted; the corporation would furnish all yarn when needed; that a pair of slippers would require only thirty minutes to complete; that a stole would require an hour

or less to complete; and only a limited number of women were being selected by the corporation to do the home work.

Beck urges for reversal: Insufficiency of the evidence to sustain the verdicts; inadequacy of the instructions given to the jury; and error in the admission of testimony and documents.

Tuthill attacks the sufficiency of the evidence and points to the inadequacy of the instructions to the jury.

In this case there were two essential elements of proof for the government to meet in making a submissible case, (1) the existence of a scheme or artifice to defraud or for the obtaining of money by means of false pretenses, representations or promises, and (2) the use of the United States mails in furtherance of such scheme or artifice. Marvin v. United States, 10 Cir., 279 F. 2d 451; Palmer v. United States, 10 Cir., 229 F. 2d 861, cert den 350 U.S. 996, 100 L. Ed. 861, 79 S. Ct. 546; Webb v. United States, 10 Cir., 191 F. 2d 512. Such proof may be made by either direct or circumstantial evidence. United States v. Ross, 92 U.S. 281; Whealton v. United States, CCA 3, 413 F. 2d 710; Brady v. United States, CCA 8, 24 F. 2d 397. No question is raised concerning proof of the use of the mails.

Fraud or the existence of a fraudulent scheme is seldom susceptible to proof solely by direct evidence and in nearly every such case, direct and circumstantial evidence together with the inferences to be drawn therefrom must be relied upon for proof. On the face of the business operation involved here, it may be argued that it was merely a legitimate business venture that did not work out successfully. That, however, was a question of fact, to be

determined by the jury after considering all of the evidence and the inferences to be drawn therefrom.

From the voluminous trial record and the many exhibits received in evidence, it seems to us the government presented a strong and persuasive fraud case. The numerous newspaper advertisements used, many of which were admitted in evidence, are of a misleading character. They indicate a desire to offer home employment when in fact they were only lures put out to procure prospects for the sale of the knitting machines. At the very time these women were led to believe California Sportswear Corporation was a thriving knitted garment concern, actually it had no substantial market at all. The exhorbitant profit made from the sale of each machine is another telling fact in the government's case. The so-called "sales pitch" or instructions to the salesmen, as shown by government exhibits 52 and 120, is false and misleading in that it instructs the salesmen to tell the prospects that California Sportswear Corporation is the wholesale distributor throughout the United States and Canada for hand-knitted garments.

There is an abundance of evidence in the record to support the government's contention that appellants devised and implemented a scheme to defraud the class represented by the purchasers of the knitting machines, by authorizing a sales program which had as its purpose the persuasion of the knitting machine purchasers that they were entering into a transaction which would bring in to them extra income, when in fact, they were only buying knitting machines.

Beyond any doubt, the government presented a sub-

missible case against both appellants and the trial court properly refused to direct a verdict of acquittal.

Appellants strongly urge error because of the court's refusal to give a separate instruction to the jury on their defense of "good faith". As they contend "good faith" is a complete defense to a mail fraud prosecution. Durland v. United States, 161 U.S. 306, 16 S. Ct. 508, 40 L. Ed. 709; Gold v. United States, 8 Cir., 36 F. 2d 16; Coleman v. United States, 5 Cir., 167 F. 2d 837. We agree also with appellants in their contention that a defendant in a criminal case is entitled to adequate jury instructions on his theory of defense, provided, however, there is evidence before the jury to reasonably support such theory. Bird v. United States, 180 U.S. 356, 21 S. Ct. 403, 45 L. Ed. 570; Little v. United States, 10 Cir., 73 F. 2d 861; Marson v. United States, 6 Cir., 203 F. 2d 904; Levine v. United States, D.C. Cir., 261 F. 2d 747, cert den 358 U.S. 869, 3 L. Ed. 2d 101, 79 S. Ct. 101. See also Coleman v. United States, supra, 167 F. 2d 837. But, the sufficiency of the instructions may not be determined by the giving, or the failure to give, any one or more instructions. To make this determination, all of the instructions given must be viewed as a whole. Walters v. United States, 9 Cir., 256 F. 2d 840.

At the outset, the trial court, with care, explained to the jury each of the 13 Counts of the indictment, setting out clearly the specific fraudulent representations alleged and relied upon by the government and the necessary elements of each offense charged. The jury was advised of the defendants' position, in that they denied the making of the alleged false representations and the use of the mails to defraud and contended they acted honestly and

in good faith. Thereby, the issue of honesty and good faith was squarely presented to the jury. Concerning the elements of the offenses charged in the first 12 Counts the court advised that intent to defraud the purchasers of the knitting machines was an essential element. In defining the word "knowingly" as used in the indictment the court explained "was to insure that no one would be convicted for an act done because of mistake, inadvertence or other innocent reasons". Concerning the use of the word "wilfully" in the same instrument, the court said, "An act is done wilfully if done voluntarily and purposely with a specific intent to do that which the law forbids; that is to say, with evil motive or bad purpose either to disobey or disregard the law." The court elaborated on the term "intent to defraud" as used in the indictment.[1]

There is some evidence in the record to support the defense of "good faith". Beck and Tuthill testified as to their good intentions and there is some other evidence from which honesty and good faith might be inferred. But all of appellants' evidence upon this issue, when weighed against the government's evidence, presented a very weak defense.

Assuming, as appellants contend, there is sufficient evidence in the record to reasonably support this defense

[1] "You will also note that the acts charged in the indictment are alleged to have been done with intent to defraud. To act with intent to defraud means to act knowingly and with the specific intent to deceive for the purpose of either causing some financial loss to another or bringing about some financial gain to oneself.

An essential element of all of the offenses here charged is an intent to defraud. And this intent must be established by the evidence beyond a reasonable doubt.

"'Intent' as used here means that the defendants must have had the purpose of willingness to defraud. A person is presumed to intend that which he voluntarily and wilfully does and to intend all the natural probable and usual consequences of his act and [illegible]

and to require the giving of jury instructions upon it, then taking all of the instructions given, as a whole, the jury was adequately and sufficiently advised concerning it, and we find no error in the instructions.

Appellant Beck urges error because of the admission of statements made by salesmen for the corporation to prospects for and purchasers of the knitting machines, all made in the absence of appellant. He relies primarily upon Beck v. United States, 8 Cir., 33 F. 2d 107, Barrett v. United States, 8 Cir., 33 F. 2d 115, and Reistroffer v. United States, 8 Cir., 258 F. 2d 379.

Our examination of those cases convinces us that they are not applicable here. In the Beck case, there was no evidence tending to show appellant had any knowledge of the statements made. The trial had proceeded on the erroneous theory that any representation made by employees of the corporation was competent, irrespective of the defendants' knowledge, authority or ratification. The Barrett case was a companion case and the court merely reiterated the need to connect the statements of salesmen to the appellant. In the Reistroffer case, the court approved the method used by the trial court in admitting the questioned testimony and the precautionary instruction finally given to the jury concerning its consideration of such testimony.

It is agreed the general rule permits the admission of such statements, if they have been expressly or impliedly authorized, or have been ratified by the person against whom they are offered. Beck v. United States, supra; Barrett v. United States, supra; Gold v. United States, supra. We are cognizant of the difficulties encountered by the government in a fraud case, but safeguards for the

defendant from the dangers of hearsay evidence cannot be disregarded. See Krulowitch v. United States, 336 U. S. 440. The authority to render such statements admissible may be found in the circumstances of the particular case, in the scope of the plan or scheme or from other pertinent facts. A proper foundation must always be laid.

In Reistroffer v. United States, 8 Cir., 258 F. 2d 379 at 387, on this evidentiary question, the court said:

> "* * * Where the scheme to defraud included making sales by means of certain false representations conveyed through salesmen, proof of the same misrepresentations being made at widely different places to different persons by numerous agents in the same period, tends to prove that the scheme existed and that the particular salesman was carrying it on. As in the case of a conspiracy in operation the acts and declarations of each participant are admissible against all."

Again, in Schaefer v. United States, 8 Cir., 265 F. 2d 750, cert den, 361 U.S. 844, 80 S. Ct. 97, 4 L. Ed. 2d 82, another mail fraud case, evidence of purchasers concerning conversations with salesmen not alleged to be parties to the scheme was held to be admissible as proving that the scheme was what the government claimed it to be, a scheme to defraud by false representations and promises. See also Grell v. United States, 8 Cir., 112 F. 2d 861; Morris v. United States, 5 Cir., 112 F. 2d 522.

In Whitehead v. United States, 5 Cir., 245 F. 385, 396, the court said:

> "* * * More than 100 witnesses were introduced, each of whom testified that the agent had, by state-

ments, led him to believe that he would, at the end of six (or eight or some other number of) months, be able to secure a loan of $1,000 from the company at 5 per cent. interest. The introduction of this evidence was strenuously objected to by the defendants. The objection was upon the ground that the representations were not the representations of the defendants or the company. If there had been evidence of a single transaction only, or of isolated and occasional transactions the contention might have appeared meritorious. But the accumulated evidence, aided as it was by the evidence of the subsequent conduct of the company, and by the correspondence with which the misrepresentations were always followed up, clearly indicates an established course of business, an important feature of which was systematic misrepresentation by agents."

In Ridenour v. United States, 3 Cir., 14 F. 2d 888, 891, the court said:

"The proofs show that the Crager System, through its salesmen, represented to the purchasers that they were the agents of the Continental Grocery Stores of Pennsylvania, Incorporated, and they further show that the Crager System employees were at all times subject to the defendants. It therefore makes no difference whether this was a contract of sale or of agency. The defendants brought into their schemes the Crager salesmen, directed them, assumed the responsibility, and reaped the reward from their sales. It was therefore not error to admit in evidence the acts and declarations of these salesmen in executing the schemes the defendants had devised."

In Osborne v. United States, 9 Cir., 17 F. 2d 246, 249, the court said:

> "A large number of the purchasers of lots or sections were permitted to testify, over objection, to representations and statements made to them by the salesmen through whom the purchases were made. This testimony was objected to on the ground that it was hearsay and that the statements were not authorized by the plaintiffs in error. If this testimony related to but a single transaction, there would be merit in the objection, but, when we consider the fact that the plaintiffs in error maintained a school for the instruction of salesmen, and issued bulletins and circulars for their guidance, and that the representations made by the different salesmen were in many instances similar in tone and were in some extent at least based upon the statements and information contained in these bulletins and circulars, we think the jury were warranted in finding that the statements and representations complained of were so made pursuant to a general plan or scheme adopted and sanctioned by the plaintiffs in error."

See also United States v. Tannel, 7 Cir., 101 F. 2d 339 and Freeman v. United States, 7 Cir., 244 F. 1.

In this case the evidence, other than the questioned statements, was ample for the jury to find beyond a reasonable doubt: The formation or devising of scheme or artifice to defraud by appellants; the active participation in the furtherance of the scheme by appellants; their setting up of a planned sales program; and their training of and instructions to the salesmen; and the active participation in the furtherance of the scheme by the salesmen.

With this foundation, the statements and representations made by the salesmen became admissible.

The testimony of the salesmen generally shows the following of a pattern concerning the training and instruction of the salesmen. They basically followed the written sales presentation as shown by government's exhibits 52 and 120, were given field training by the defendants and attended sales meetings. There can be no question but what they knew that the chief objective of their efforts was to sell knitting machines and that the suggestions, as shown by the above exhibits, were for the sole purpose of making sales of such machines. The salesmen basically followed the written sales presentations furnished by appellant and some used the sales brochure (government exhibit 50). These exhibits may well be said to constitute implied authority to make the statements attributed to them by the various witnesses and complained of by Beck. We must conclude the trial court did not err in the admission of the salesmen's statements or representations.

Beck also contends the court erred in admitting testimony and documents with respect to events occurring after he had severed his connection with the company, and in refusing to give his tendered instruction concerning withdrawal. These contentions may be considered together.

These two contentions are answered by the verdict returned by the jury. Beck was convicted of four separate offenses. In point of time, the last offense was committed on May 19, 1958, and about a month prior to the consummation of the sale and transfer of all of his stock in the corporation. Therefore, any testimony or documents with respect to events occurring after June, 1958, which was admitted during the trial, was not considered by the jury

in arriving at its verdict as to Beck. It cannot be concluded that any prejudice against Beck resulted from this evidence. It was clearly admissible under the conspiracy count and as against Beck's codefendants, who maintained their connections with the company after June, 1958.

After viewing the extensive trial record as a whole and giving careful consideration to all of the contentions made here by appellants, we must conclude, that the appellants were given a fair trial and we are unable to find any prejudicial error.

AFFIRMED.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Criminal Action No. 16093

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID R. TUTHILL, GEORGE BECK, and CHARLES E. CONKLIN,
Defendants.

Court Room "D"
U. S. Post Office Building
Denver, Colorado
Friday, December 9, 1961

TRANSCRIPT OF COURT'S INSTRUCTIONS TO THE JURY AND EXCEPTIONS

The above-entitled matter came on for trial at the hour of 9:30 A.M., November 23, 1960, through December 9, 1960, before the Honorable HATFIELD CHILSON, Judge, and a duly impaneled jury.

The Government appeared by Messrs. RICHARD P. MATSCH and JACK K. ANDERSON, Assistant United States Attorneys.

The Defendant DAVID R. TUTHILL appeared in person and by his attorney, JOHN J. DUNN, Symes Building, Denver, Colorado.

The Defendant GEORGE BECK appeared by MR.

RUSSELL E. KRAMER of Calkins, Rodden & Kramer, Attorneys at Law, First National Bank Building, Denver, Colorado.

The Defendant, CHARLES E. CONKLIN appeared in person and by Messrs. JAMES C. OWEN, JR. and RICHARD L. SCHREPFERMAN, of Holme, Roberts, More and Owen, Attorneys at Law, Denver U. S. National Center, Denver, Colorado.

PROCEEDINGS

THE COURT: Let the record show that the Government is present by counsel and defendants are present in person and by their counsel.

Ladies and Gentlemen of the Jury, now that you have heard the evidence and argument, the time has come to instruct you as to the law which will govern you in this case.

Although, you as jurors, are the sole judges of the facts, you are duty-bound to follow the law as stated in the instructions of the Court, and to apply the law so given to the facts as you may find them from the evidence before you.

You are not to single out any one of these instructions alone as stating the law, but must consider the instructions as a whole. As you know, you hear the instructions only once, and the instructions in a case of this kind are of some length. So, the Court will appreciate — and I am sure you will — your paying rather close attention to the instructions.

You are not to be concerned with the wisdom of any rule of law, regardless of any opinion you may have as

to what the law ought to be. It will be a violation of your sworn duty to base a verdict upon any other view of the law than that given by the Court.

Now, you have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denials made by the not guilty pleas of the accused. And you are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy or prejudice or public opinion. The accused and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

The indictment in this case, as I will explain to you in more detail later, alleges thirteen counts or offenses, and all of which are based on a charge of the use of the United States mails with intent to defraud. Now, the indictment is merely the written charge against the defendants. It is not evidence and it is not to be considered by you as evidence.

Now, to the indictment the defendants have entered pleas of not guilty to each and every charge, and thereby, the defendants deny the making of false representations as alleged in the indictment, and deny that they used the mails with intent to defraud, but contend in all respects that they acted honestly and in good faith. And the issues to be determined by you are those made by the charges contained in the indictment and the not guilty pleas of the defendants here on trial.

Now, you will take the indictment with you to the jury room, but you will note, when you take the indictment with you, that in addition to the charges against the

three defendants on trial here, namely: David R. Tuthill, George Beck, and Charles Conklin, you will note that the indictment also contains charges against Patricia L. Tuthill and Herbert O. Tinsley. Now, the only defendants here on trial are the three: David R. Tuthill, George Beck and Charles E. Conklin, and you will therefore disregard all references in the indictment relating to Patricia Tuthill and Herbert O. Tinsley, and read the indictment as though all references to them were deleted from the indictment. It is for this reason therefore that the Court has crossed out certain allegations appearing on pages 9 and 10 of the indictment relating to certain acts done by Patricia L. Tuthill and Herbert O. Tinsley. And you will entirely disregard those allegations which the Court has stricken out.

Now, the indictment is quite long, but essentially it is not too complicated. And I will discuss the indictment. The indictment alleges a total of 13 counts. As I have told you before, these counts are really divided into two categories. Counts 1 to 12 — that is the first 12 counts — of the indictment charge the defendants with the violation of a Federal statute, namely: 18 United States Code, Section 1341. Keep in mind Section 1341, because I will refer to it later. Now, count 13, the last count of the indictment, charges the defendants with a conspiracy to violate Section 1341. So, in effect, we have two groups of charges: One direct charge as to the violation of Section 1341; and the 13th count which alleges a conspiracy to violate Section 1341.

Now, Section 1341 above which I have referred to reads in essence as follows: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or

fraudulent pretenses, representations, or promises, for the purpose of executing such scheme or artifice or attempting to do, places in any post office or authorized depository for mail matter, any matter or things whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be punished as provided by law."

That language is perhaps just a little complicated, but I think you understand what it means. In essence, it is the use of the United States mails with intent to defraud.

Now, counts 1 to 12, as I have said, allege a violation of this statute. And count 13 alleges a conspiracy to violate this statute. And I will refer to the conspiracy count.

Referring now to the first 12 counts, you will notice that the first 7 paragraphs of the indictment, which are found on pages 1, 2, and 3, set forth in general the Government's allegations concerning an alleged plan or scheme to defraud. In addition it sets forth certain alleged misrepresentations and how the plan or scheme is alleged to have been operated to defraud persons by obtaining money from them by virtue of that alleged scheme and the alleged false representations. Now, these first 7 paragraphs are incorporated by reference in each of the other counts to 12.

Now, in addition to these first 7 paragraphs, in each count there is alleged a specific and different use of the mails alleged to have been made in carrying out the alleged plan or scheme, and each different use of the mails

alleged in the indictment constitutes a separate and distinct offense, although the alleged scheme and misrepresentations are the same as to each of the alleged offenses. The indictment alleges 12 specific and different uses of the mails which the Government contends were made to carry out this plan or scheme, and because of these separate alleged uses, we have the 12 different counts.

Now, with this preliminary explanation of the indictment, I would like to discuss with you the first 12 counts by reading, not entirely word-for-word, but in general, the terms of the indictment.

Now, count 1 states that the grand jury charge in paragraph 1 reads: "That on or about the 24th day of May, 1957, and continually thereafter until the date of August 1, 1959, the defendants David R. Tuthill, George Beck, and Charles E. Conklin, did unlawfully, knowingly, and wilfully devise and intend to devise a scheme and artifice to defraud, and to obtain money by means of false and fraudulent pretenses, promises, and representations to a class of persons residing in and around Denver, which class consisted of persons interested in employment which could be performed by said class of persons working in their homes, and which classes consisted of the following: . . ." Then there is a list of names.

Now, you will recognize, I am sure, many of the names listed as witnesses who testified. In addition to the named persons, the indictment continues, ". . . and diverse other persons to the grand jury unknown, which said class is hereinafter referred to as the persons to be defrauded."

Now, the second paragraph reads: "It was a part of the scheme and artifice to defraud for the defendants

David R. Tuthill and George Beck to form a corporation under the name of California Sportswear Corporation of Colorado, hereinafter referred to as California Sportswear Corporation, under the laws of the State of Colorado, which said company was incorporated on or about the 24th day of May, 1957."

The third paragraph reads as follows: "It was a further part of the scheme and artifice to defraud for the defendants David R. Tuthill, George Beck, and Charles E. Conklin to cause the insertion in daily and weekly newspapers in the Denver and Denver suburban area, advertisements offering a limited number of women employment in their own homes doing piece work if they had fifteen free hours per week to devote to such enterprise. Such women were to reply to a Denver post office box number, giving their own telephone number."

The fourth paragraph: "In furtherance of the scheme and artifice to defraud, all the defendants caused to be made and did make to the persons intended to be defrauded the following false and fraudulent representations, pretenses, and promises, all of which the defendants knew were false and fraudulent when made, for the sole purpose of inducing such persons to purchase the Regina Knitting Machine at a sale price of from $299.50 to $350.00 each, plus carrying charges, which price was more than three times the amount paid by said California Sportswear Corporation for said machines."

And then there is listed the specific representations which the Government alleges were false. The first one is marked "(a) That California Sportswear Corporation was a company doing business primarily as a wholesaler and jobber of knitted garments, and that the sale of knit-

ting machines was merely incidental to that primary purpose.

"(b) That California Sportswear Corporation had a large and expanding profitable market for knit garments and urgently needed large quantities of knitwear to fill existing orders.

"(c) That a profit of at least $10 and up to $50 per week could be made if a minimum of fifteen hours per week were devoted to knitting for California Sportswear Corporation.

"(d) That the profits obtained from knitting four to five hours each week would be sufficient to meet the monthly payment for the purchase of the Regina knitting machine.

"(e) That California Sportswear Corporation would purchase for a period of three years all garments made to company specifications and patterns knitted on the Regina knitting machine without limitation.

"(f) That California Sportswear Corporation would furnish all yarn when needed and in any quantity needed to the persons to be defrauded.

"(g) That a pair of slippers would require only thirty minutes to complete once the person to be defrauded became accustomed to the machine.

"(h) That a stole would require one hour or less to complete once the person to be defrauded became accustomed to the machine.

"(i) That only a limited number of women were being selected by the California Sportswear Corporation to do work at home."

Ladies and Gentlemen of the Jury, those are the representations which the indictment alleges were made and were false and fraudulent.

Now, paragraph 5 of the indictment then reads: "It was a further part of the scheme and artifice to defraud for all the defendants to cause to be and to obtain the signatures of both the persons to be defrauded and their husbands to a note and chattel mortgage to secure payment of the purchase price of the knitting machines, and to have such persons to be defrauded taken to a finance company where loans were obtained for the purchase of the Regina knitting machine after which the check received by the person to be defrauded would be endorsed over to the California Sportswear Corporation."

The 6th paragraph reads: "It was a further part of the scheme and artifice to defraud for all the defendants to allow the persons to be defrauded to produce items relatively easy to make for a period of one to two months, then require such person to manufacture only items which were difficult to make and which necessitated long hours to knit and finish."

The 7th paragraph: "It was one of the primary objects, intents and purposes of said scheme, for all of the defendants to sell or cause to be sold the Regina knitting machine to the persons to be defrauded for from $299.50 to $350.00, plus carrying charges, and to receive full payment of the purchase price of such machines from the persons to be defrauded immediately after the consummation of the sale, thereby insuring quick realization of approximately $200.00 to $270.00 profit from the sale of each machine, all by means of the foregoing and other false and fraudulent pretenses, representations and promises, where-

by such persons were deceitfully induced to believe that the primary business of California Sportswear Corporation was the distribution and sale of knitted garments produced by such persons, and that the persons to be defrauded were thereby acquiring a means of supplementing their income."

Now, those first seven paragraphs are a part of each of the first 12 counts.

Now, the use of the mails in the first count of the information is found in paragraph 8 which reads as follows: "That on or about the 26th day of September, 1957, at Denver, in the State and District of Colorado, the defendants David R. Tuthill, George Beck, and Charles E. Conklin, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a letter from Mrs. Anita Phillips addressed to Post Office Box 3416, Alcott Station, Denver, Colorado, which letter was to be sent and delivered by the Post Office Department of the United States, in violation of 18 U.S.C. 1341."

Now, that is the first count of the information. The second count of the information, as I have said, contains the first seven paragraphs of the first count, and says as to the use of the mail, "That on or about the 7th day of October, 1957, at Denver, in the State and District of Colorado, the defendants David R. Tuthill, George Beck, and Charles E. Conklin, for the purpose of executing the aforesaid scheme and artifice and attempting so to do, caused to be placed in an authorized depository for mail matter, a letter from Mrs. Nancy L. Grout, addressed to Post Office Box 3416, Alcott Station, Denver, Colorado, which letter was to be sent and delivered by the Post

Office Department of the United States, in violation of 18 U.S.C. 1341."

That is count 2.

Count 3 contains the original first 7 paragraphs and alleges other uses of the mails on February 3, 1958, and the particular letter is alleged to have been one from Mrs. Eleanor J. Fink, addressed to Post Office Box 3416, Alcott Station, Denver, Colorado. I think you see the pattern now.

Count 4 realleges the first 7 paragraphs and alleges another violation or use of the mails occurring on May 19th, 1958.

The 5th count is the same, and the use of the mails is one alleged to have occurred on August 3rd, 1958.

And count 6 alleges the use of the mails on August 14, 1958. Count 7, a use of the mails on August 14, 1958. And count 8 alleges a use of the mails on September 18, 1958. Count 9, a use of the mails occurring on October 9th, 1958. Count 10 alleges a use of the mails on October 9th, 1958. Count 11 alleges a use of the mails on October 10th, 1958. And count 12 alleges a use of the mails on May 26th, 1959.

Now, I believe, Ladies and Gentlemen, that is the best that the Court can do to tell you about the allegations of the first 12 counts, which all allege a violation of Section 1341.

Now, count 13 is the conspiracy count, and that count alleges, "That on or about the 24th day of May, 1957, and continuing to on or about the 1st day of August, 1959, the defendants David R. Tuthill, George Beck, and Charles E.

Conklin, within the State and District of Colorado, did wilfully, knowingly and unlawfully conspire, combine, confederate and agree together and with each other to commit an offense against the United States, to-wit: to knowingly use the mails for the purpose of executing a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises, in violation of Title 18 U.S.C., Section 1341, which scheme and artifice is more particularly described in Paragraphs 1 through 7 inclusive of Count I of this indictment — now, that is the first 7 paragraphs that I read to you — and which paragraphs are hereby realleged and incorporated herein.

"In pursuance of said unlawful conspiracy, and for the purpose of effecting the objects thereof, the defendants committed the following overt acts:"

I wish you would keep that word in mind, those words, "overt acts," because I will refer to them, to overt acts, subsequently in the instructions.

Now, the indictment says the defendants committed the following overt acts: 1. "Each and every act of the defendants, as described in the first 12 counts of this indictment, is hereby re-alleged and designated as overt acts committed within the State and District of Colorado.

"2. In addition, the following overt acts are hereinafter described:

"(a) On or about the 17th day of June, 1957, at Denver, in the State and District of Colorado, the defendant George Beck did induce and sell one Regina knitting machine to Mrs. Genita Esbenson for $322.02, including carrying charges.

"(b) On or about April 19, 1958, at Denver, in the State and District of Colorado, the defendant David R. Tuthill applied for Post Office Box number 3586, Santa Fe Station, Denver, Colorado.

"(c) On or about June 10, 1958, at Denver, in the State and District of Colorado, the defendant David R. Tuthill did have a conversation with Mrs. Harold Becker."

Now, d and e are stricken. You will recall that I told you we were striking certain allegations concerning the acts by Patricia Tuthill and Herbert O. Tinsley.

"(g) On or about the 17th day of August, 1958, at Denver, in the State and District of Colorado, the defendant Charles E. Conklin did have a conversation with Mrs. Hellen Hager.

"(h) On or about the 27th day of October, 1958, at Denver, in the State and District of Colorado, the defendant Charles E. Conklin did have a conversation with Mrs. Eldine Arceneaux, all in violation of 18 U.S.C. 371."

Now, again, the Court repeats that the allegations contained in the indictment and the indictment itself are not evidence. They are merely the written charges.

Now, referring to the conspiracy count, count 13 — Well, first, I want to go back to the first 12 counts of the information. We have got these divided. Now, as to the first 12 counts of the information, the elements of the charge in each count are these: (1) that a plan or scheme was devised as alleged in the indictment; (2) to obtain money from a certain class of persons set forth in the indictment by inducing them to purchase the Regina knitting machines for a price from $299.50 to $350.00 plus carrying charges, and which price was more than three times

the amount paid therefor by California Sportswear Corporation. That is the second essential element.

The third essential element is to do this by means of certain false and fraudulent representations and promises as set forth in the indictment; (4) with intent to defraud the purchasers of the knitting machines; (5) that the defendants used or caused to be used the United States mails in the manner charged in each of the first 12 counts in carrying out the plan or scheme.

Now, the burden of proof is upon the Government to prove each of these elements beyond a reasonable doubt. It will be your duty to treat each count separately and determine as to each defendant his guilt or innocence as alleged in each of these counts.

If you entertain a reasonable doubt of the guilt of any defendant of the charges contained in any of counts 1 to 12 of the indictment, it shall be your duty to find that defendant or those defendants, as to whom you entertain a reasonable doubt of their guilt, not guilty as to that particular count or those particular counts.

Now, the Court has ruled that the evidence fails to show that the defendant Charles E. Conklin was connected with California Sportswear in any manner at the time of the alleged uses of the mails contained in count one and count two. The use of the mails alleged in count one was September 26, 1957; and in count two, October 7th, 1957. And there is no evidence to show that the defendant Charles E. Conklin was in any manner connected with the enterprise on those dates; therefore, the Court directs an acquittal on the charges contained in counts 1 and 2 as to the defendant Charles E. Conklin. And in your consideration of count 1 and count 2, you will consider those

two counts only as against the defendants David R. Tuthill and George Beck.

Now, I go to the first conspiracy count, the 13th count of the indictment. Now, the statute which defines a conspiracy is Title 18, United States Code, Section 371, and reads in substance as follows: "If two or more persons conspire to commit any offense against the United States and one or more of such persons do any act to effect the object of the conspiracy, each shall be punished as provided by law."

Thus, it is seen that there are two basic elements constituting the crime of conspiracy: the first, two or more persons must conspire to commit an offense against the United States; and secondly, one or more of the conspirators must commit an overt act in furtherance of or to carry out the object or purpose of the conspiracy.

The indictment charges that as to the first element, the defendants did conspire to commit an offense against the United States, namely: a conspiracy to violate Section 1341, which the Court has previously read to you.

The indictment also charges certain specific overt acts committed by one or more of the defendants in furtherance of and to carry out the objects and purposes of the conspiracy.

Now, the burden of proof is upon the Government to prove both of these elements to your satisfaction beyond a reasonable doubt.

In considering this count of the indictment, it will be your first task to determine whether or not there was a conspiracy to defraud certain persons in violation of Section 1341: that is to say, whether or not there was a con-

spiracy by two or more of the defendants to use the mails to obtain money from the class of persons described in the indictment by inducing them to purchase Regina knitting machines, and to accomplish this by one or more of the false and fraudulent representations and promises alleged in the indictment, and with intent to defraud the purchasers of the knitting machines.

Now, if after a consideration of all the evidence relating to the existence of the alleged conspiracy, you entertain a reasonable doubt as to the existence of a conspiracy, you should then conclude your deliberations on count 13 at that point, and render a verdict of not guilty as to all of the defendants.

However, if you are satisfied from the evidence beyond a reasonable doubt that there was a conspiracy as charged in the indictment, you will then proceed to consider whether the defendants or some of them were members of its. Any defendant who has not been proven a member of the conspiracy to your satisfaction beyond a reasonable doubt, should be acquitted as to this count of the indictment.

Now, your next consideration should be whether or not any one or more of those who you find are members of the conspiracy committed one or more of the overt acts charged in the indictment to effect the object of the conspiracy.

Although the Government is not required to prove each and every overt act charged in the indictment, the burden of proof is upon the Government to prove to your satisfaction beyond a reasonable doubt that at least one of the overt acts charged was committed by at least one of the members of the conspiracy. If you find from the

evidence that the Government has failed to prove the commission of at least one of the overt acts charged in the indictment by at least one of the members of the conspiracy, beyond a reasonable doubt, they you should acquit all of the defendants as to the 13th count of the indictment.

Now, an overt act need not of itself be criminal or unlawful. It may be an act which, considered separately from the conspiracy, is innocent and lawful. But it must, however, be an act done in furtherance of the conspiracy and one which tends to promote or further the accomplishment of the unlawful plan or agreement.

To prove the existence of a conspiracy beyond a reasonable doubt, I instruct you that it is not necessary for the Government to prove that the defendants met together and entered into a formal agreement, such as signing a written contract, or that they had a steadfast, iron-clad oral agreement. If such were the case, the crime of conspiracy could rarely if ever be proved, for agreements to violate laws are not usually reduced to writing or made the subject of express oral agreement. The agreement, understanding, or conspiracy need not be proved by direct evidence, although sometimes direct evidence is available. You have a right to consider all the facts and circumstances in evidence in determining whether or not there was an agreement or understanding to violate Section 1341 of Title 18, United States Code.

It is sufficient that if the evidence proves beyond a reasonable doubt that the alleged conspirators had a meeting of minds, a mutual understanding, and that the meeting of minds and mutual understanding was to violate Section 1341. All conspirators need not have originally

conceived the conspiracy or participated in its conception. Those who come in later with knowledge of the purposes and aims of the conspiracy, and cooperate in the common effort to attain the unlawful results, become parties thereto. So you need not be concerned as to when a person joined the conspiracy as long as you find beyond a reasonable doubt that he joined the conspiracy during its existence, with knowledge of its aims and objectives.

Now, a conspiracy is not ended as long as the evidence shows an intention to continue it. A conspirator has the right to withdraw from the execution of the conspiracy, but it requires affirmative and effective action thus to withdraw and terminate liability in the conspiracy and a defendant asserting his withdrawal has the burden of satisfying you that he did in fact sever his participation in the enterprise, and withdrawal from a conspiracy does not absolve the person so withdrawing, if, during the time that said person was a member of the conspiracy, an overt act, as the Court has defined it to you, was committed to effect and carry out the object of the conspiracy.

Now, each count of the indictment charges the defendants with making or causing to be made certain false representations and promises. It is not necessary that the Government prove that all of the representations alleged in the indictment were false. It is necessary that the Government prove beyond a reasonable doubt, as to each defendant and as to each count that a false representation or promise was made with intent to defraud during the period of time each defendant was chargeable as being a participant in the scheme or plan or the conspiracy.

One who makes false representations or promises, not knowing whether they be true or false, and with reckless

indifference as to whether they are true or false may be considered by you to have been knowingly falsely made.

The burden of proof is upon the Government to prove beyond a reasonable doubt that one or more of the representations or promises set forth in the indictment were in fact false, and that they were known by the defendants to be untrue at the time they were made; or that false representations and promises were made with reckless indifference as to whether the representations or promises were true or false.

If you should determine from the evidence beyond a reasonable doubt that some one or more of the representations alleged in the indictment were made and were false, and that they were made by employees of the defendants or of companies which the defendants owned or controlled -- that really, in this case, should be or of a company which the defendants owned or controlled — those false representations are chargeable to the employers if you also find from the evidence beyond a reasonable doubt that the misrepresentations were expressly or impliedly authorized by the employers, or that the employers participated in, counselled or approved what the employees were doing, or if the employers commanded, aided, or abetted or encouraged the employees to make the misrepresentations.

Now, all who join themselves to an unlawful scheme with knowledge of its existence and with fraudulent intent, are responsible for the acts and declarations of the other participants to the unlawful scheme.

It is not essential in a case such as this that the letters or other matter mailed or delivered by mail be of a nature calculated to be effective in and of themselves in

carrying out the fraudulent scheme. They may be entirely innocent on their face. It is enough that the matter mailed was intended to assist in executing the plan or scheme.

It is not necessary that the Government prove that the defendants actually mailed the postcards or letters themselves. It is sufficient if they caused the mails to be used.

Now, in the indictment you will notice that the offenses are charged as being committed on or about a certain date. It is not necessary that the proof establish with certainty the exact date of the alleged offenses. It is sufficient if the evidence shows beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

Now, you will also note that the acts charged in the indictment are alleged to have been done knowingly. The purpose of having the word "knowingly" was to insure that no one would be convicted for an act done because of mistake or inadvertency or other innocent reasons.

You will also notice that the acts charged in the indictment are alleged to have been done wilfully. An act is done wilfully if done voluntarily and purposely and with a specific intent to do that which the law forbids; that is to say, with evil motive or bad purpose, either to disobey or disregard the law.

You will also notice that the acts charged in the indictment are alleged to have been done unlawfully. Unlawfully means contrary to law; hence, to do an act unlawfully means to do wilfully something which is contrary to law.

You will also note that the acts charged in the indict-

ment are alleged to have been done with intent to defraud. To act with intent to defraud means to act knowingly and with the specific intent to deceive for the purpose of either causing some financial loss to another or bringing about some financial gain to oneself.

An essential element of all of the offenses here charged is an intent to defraud. And this intent must be established by the evidence beyond a reasonable doubt.

"Intent" as used here, means that the defendants must have had the purpose or willingness to defraud. A person is presumed to intend that which he voluntarily and wilfully does and to intend all the natural, probable and usual consequences of his act and conduct.

Now, intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus may be able to give direct evidence of what defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

In determining the issue as to intent, the jury are entitled to consider all facts and issues in evidence which may aid determination of state of mind.

There are two types of evidence from which a jury may properly find a defendant guilty of an offense: one is direct evidence, such as testimony of an eye-witness; the other is circumstantial evidence under the proof of a chain of circumstances pointing to the commission of an offense.

Now, as a general rule, the law makes no distinction

between direct and circumstantial evidence, but simply requires that before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

A defendant in a criminal case is not required by law to prove his innocence. The burden is upon the United States to prove his guilt of the offense or offenses charged against him in every material element thereof beyond a reasonable doubt. He is presumed to be innocent of such charge until his guilt is established by legal evidence beyond a reasonable doubt. This presumption of innocence follows him throughout the trial and entitles him to an acquittal, unless you are convinced of his guilt beyond a reasonable doubt. In the event that you have a reasonable doubt upon the whole case as to any defendant being proved to be guilty as to any count, then it will be your duty to resolve that doubt in his favor and acquit him.

A defendant should be acquitted if the evidence is equally consistent with innocence as it is with guilt. A defendant is not to be convicted on mere suspicion or conjecture. A reasonable doubt exists in any case, when, after careful and impartial consideration of all the evidence, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge. The reasonable doubt referred to is a fair doubt, based upon reason and commonsense, and arising from the state of the evidence. It does not mean the mere possibility of a doubt. It is rarely possible to prove anything to an absolute certainty.

Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs.

Now, you are the sole judges of the credibility of the witnesses and the weight and value to be given to their testimony. In passing upon the credibility of any witness, you have a right to take into consideration his or her conduct and demeanor upon the witness stand; his or her interest, if any, in the outcome of the case; the reasonableness or unreasonableness of the testimony given; its probability or lack of probability; the opportunity the witness had to observe the facts concerning which he or she has given testimony; the consistency or inconsistency of statements made upon the witness stand with those made at other times and places as shown by the evidence in the case. All of these things you may take into consideration in passing upon the credibility of any witness and the weight of testimony given. If you believe that any witness has wilfully testified falsely to any material fact, you then are at liberty to disregard the whole or any part of that witness' testimony.

Now, the defendants have offered themselves as witnesses in this case and have testified. Now, having done so, you are to determine their credibility in the same way as you would the credibility of the testimony of any other witness.

The punishment provided by law for the offenses charged in the indictment is a matter exclusively within the province of the court and is not to be considered by the jury in arriving at an impartial verdict as to the guilt or innocence of the accused.

Now, these instructions contain the law which will govern you in this case. In determining the facts, you should consider only the evidence given upon the trial. Evidence offered at the trial and rejected by the Court,

and evidence stricken from the record by order of the Court should not be considered by you. The opening statements and arguments of counsel, and the remarks of the court and of counsel are not evidence. The arguments and statements and objections made by counsel to the Court or to each other, and the rulings and orders made by the Court and the remarks made by the Court during the trial and not directed to you should not be considered by you in arriving at your verdict.

Now, the Court did not by any words uttered during the trial, and the Court does not by these instructions, give or intimate or wish to be understood by you as giving or intimating any opinions as to what has or has not been proven in this case, nor as to what are or are not the facts in the case, with the single exception, of course, where the Court has directed an acquittal of the defendant Conklin on counts 1 and 2. No single one of these instructions states all the law applicable to the case, but all of these instructions must be considered together as they are connected with and related to each other as a whole.

Now, unless otherwise indicated, each instruction given should be considered by you as referring separately and individually to each of the defendants on trial.

Upon retiring to the jury room, you will select one of your number to act as foreman. The foreman will preside over your deliberations and be your spokesman in court.

Now, forms of verdict have been prepared for your convenience. There is a form of verdict for each of the defendants; that is, a separate form for each defendant, and on it is listed each of the thirteen counts. When you have arrived at your verdict as to the count, as to any defendant, you will, of course, fill in the words "not

guilty" or the word "guilty," whichever applies. You will notice that on the form of the verdict for the defendant Charles E. Conklin that as to the first two counts, counts 1 and 2, the Court has already inserted the words "not guilty."

Now, you will take these forms to the jury room, and when you have reached unanimous agreement as to your verdict, you will have your foreman fill in and sign the forms of verdict which you have agreed upon, and then return with your verdict to the court room.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the bailiff. But bear in mind that you are not to reveal to the Court or any persons how the jury stands numerically or otherwise on the question of the guilt or innocence of the accused, until after you have reached a unanimous verdict.

Now, we have already arranged to have the exhibits in this case taken to the jury room. They are now there. You will take with you, when you retire, the indictment and the forms of verdict. Again, the court warns you that the indictment itself is not evidence. It is merely the formal charge.

Will counsel approach the bench?

(The following proceedings were had at the bench out of the hearing distance of the jury.)

THE COURT: Are there any objections to the instructions as given?

MR. SCHREPFERMAN: Yes, Your Honor. We object to the statement in the instructions concerning the good faith of the defendants. We don't feel that it was

sufficient to show the theory of the defense, and the Court did not state that good faith was a defense.

We except to the statement that it is not necessary for the conspirators to meet together or have an iron-clad agreement.

We further except to Your Honor's statement as to the two types of evidence necessary to find the defendants guilty, direct and circumstantial.

I think the other exceptions are contained in the instructions which we submitted and which were refused.

MR. DUNN: Same objections, Your Honor.

MR. KRAMER: I would like to add two additional exceptions. If I understand the Court's instructions correctly with respect to withdrawal, I would object to the instruction that a person is liable for the acts of a conspiracy following his withdrawal simply because an overt act had been committed previous to his withdrawal. I think the instruction as it was given would tend to indicate that regardless of the withdrawal, the person withdrawing would still be liable for the acts, overt acts, in the conspiracy.

Certainly I would like to make the additional objection to the Court including in the instructions on intent the wording with respect to a person presuming to intend the ordinary results of his acts, which acts, I do not feel are appropriate in a fraud case.

THE COURT: Very well. The objections will be noted. They are overruled.

(The Court then dismissed the alternate juror.)

THE COURT: The jury will now retire with the bailiff to start their deliberations.

(The jurors then left the court room.)

THE COURT: The bonds of the defendants will be continued, pending the return of the verdict.

Court will now be in recess.

(The trial was then recessed. Later on that same day, the following proceedings were had out of the presence of the jury.)

THE COURT: Criminal action number 16093. Let the record show that the Government is present by its counsel and the defendants are all present in person and by their counsel.

It is now ten minutes to two. The Court at 12:15 received from the jury the following: "If we find the defendant not guilty on count 13, is he also not guilty on the other 12 charges? Foreman: Roy Sanders."

Immediately upon receipt of this communication, the Court took steps to get in touch with all counsel. The Court has determined that the proper thing to do is to instruct the jury further for the reason that in reviewing the Court's instructions, the Court found that it did not give its usual instruction to the effect that each of the counts of the information charged a separate offense, and that each count should be considered separately by the jury with the usual stock instruction.

The Court has furnished to counsel a copy of the remarks which the Court intends to make to the jury. The Court intends to bring the jury in and instruct them further. Counsel having a copy of what the Court proposes

to say to the jury, are there any objections on the part of the Government?

MR. MATSCH: The Government has no objection to the proceedings.

THE COURT: Are there objections on the part of the defendants?

MR. KRAMER: If the Court please, on behalf of the defendant Beck, and with the agreement of counsel representing the other defendants, and subject to any additional comment that they might care to make, I should like to interpose a very strenuous objection to any further instructions to the jury as this time. I feel that any further instructions to the jury by the Court, while they are in deliberation, and particularly in view of the type of a question that has been asked, could be most prejudicial to the defendants. I think that the Court's instructions as given this morning clearly covered the point which has been raised by the foreman of the jury. While it is perhaps true — and my recollection is not exact as to the Court's instructions with respect to the diversity of the counts as applied to the individual defendants — I would like to call attention to the fact that I am sure from my recollection that the Court did instruct the jury that in order to find a defendant guilty of the crime of conspiracy, as alleged in count 13, there must have been a finding that the defendant was guilty of a conspiracy to violate Section 1341, which is the mail fraud statute. I think the Court's present instruction with respect to the conspiracy count, the nature of it, the manner in which the jury is to pass on it, has been stated clearly. I think that the jury has had adequate instructions with respect to it as this Court saw fit to give them. And I personally feel that

any further instruction at this time might not only distort the previous instructions which the Court has given the jury, but might in some indirect way indicate some feeling on the Court's part with respect to the guilt or innocence of these defendants; and I strongly urge that the Court refrain from any further instruction to the jury. Thank you, sir.

THE COURT: Very well. Do other counsel join in the objections?

MR. SCHREPFERMAN: Yes, Your Honor.

THE COURT: Is there anything additional?

MR. SCHREPFERMAN: I join in on behalf of Mr. Conklin. I would also like to object to the instruction as given alone. I think that the jury in this type of case should be entitled on the basis of our defense, that is, good faith and lack of intent, to consider the evidence over all as well as it applies to each count. I feel the instruction as given here which emphasizes the first twelve counts without respect to the 13th. And I object to it additionally on that basis, Your Honor.

THE COURT: Very well. The objections will be noted.

Mr. Dunn?

MR. DUNN: On the part of the defendant Tuthill, I believe Your Honor at great length analyzed each of the 12 counts, the substantive counts of the indictment, and spoke at length on your analysis of the various elements of the 13 counts. Therefore, on the part of the defendant Tuthill, we strenuously object to any further instruction of the jury at this time.

THE COURT: Is there anything further? The objections will be overruled. Mr. Bailiff, will you call the jury.

(The jury being present, the following proceedings were had:)

THE COURT: Let the record show that the jury is now present.

Ladies and Gentlemen of the Jury, the Court has received from your foreman the following inquiry:

"If we find a defendant not guilty on count 13, is he also not guilty on the other 12 charges?"

Ordinarily the Court does not respond to requests for additional instructions, but the Court will make an exception in this case, and in addition to the instructions which the Court has already given you, the Court gives you this additional instruction:

Each count of the indictment charges a separate crime or offense as against each of the defendants. Each count of the indictment and the offense charged therein and the evidence applicable thereto should be considered separately. The fact that you may find all or some of the defendants guilty or not guilty of one of the offenses charged should not control your verdict with respect to any other offense charged.

Now, this instruction you are not to consider alone, but this instruction must be considered together with all the other instructions which the Court has previously given you, as they are connected with and related to each other as a whole.

You may now return to the jury room and continue your deliberations.

(The jury then returned to their jury room.)

THE COURT: Court will be in recess subject to call.

(At 5:00 o'clock p.m. this date, the Court then recessed.)

REPORTER'S CERTIFICATE

I, Thomas T. Tomko, Official Court Reporter to this Court, Certified Shorthand Reporter under the laws of the State of Colorado, do hereby certify that I was present at and did report in machine shorthand the above proceedings; that the foregoing is a true and correct transcript, the same having been transcriped under my direction and supervision.

IN WITNESS WHEREOF, I have hereunto set my hand this 26th day of July, 1961.

THOMAS T. TOMKO
Thomas T. Tomko
Official Court Reporter

(Seal, U. S. Circuit Court of Appeals, 10th Circuit.)

A true copy:

Teste:

Robert B. Cartwright, Clerk, U. S. Court of Appeals, Tenth Circuit.

Appendix C

Instructions Tendered by Defendants

INTENT TO DEFRAUD No. 1

You will note that the acts charged in the indictment are alleged to have been done with the "intent to defraud."

To act with "intent to defraud" means to act knowingly and the specific intent to deceive, for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself.

An essential element of all of the offenses here charged is an intent to defraud, and this intent must be established by the evidence beyond a reasonable doubt.

"Intent" as used here means that the defendants must have had the purpose or willingness to defraud.

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

In determining the issue as to intent, the jury are entitled to consider all facts and circumstances in evidence which may aid determination of state of mind. Consideration should be given to the testimony of the defendants as

to their individual intent, and such testimony should be weighed in the light of the other evidence.

12/8/60

REFUSED

HATFIELD CHILSON
JUDGE

MISREPRESENTATIONS No. 2

Each count of the indictment charges the defendants with making or causing to be made certain false representations and promises.

The word "false" means that the representation or promise when made was untrue, and that it was then known to be untrue by the person authorizing or making the representation or promise.

If you find that false statements and representations were made and that the same were made with reckless indifference as to whether they were true or false, you may consider them to have been knowingly falsely made. By reckless indifference is meant acting without inquiry as to the basic for the statement or without any reasonable effort to reach a conclusion as to facts represented.

In this case, in determining whether false representations or promises, as alleged in the indictment, were made or authorized by the defendants, or any of them, you may take into consideration all of the evidence in the case, including the defendants' contention that they had no intention to defraud anyone, their contention they engaged in what they in good faith believed to be a legitimate enter-

prise and did not intend to make use of the United States mails for the purpose of defrauding; and they did, in good faith, rely on certain representations and promises made by others.

The burden of proof is upon the Government to prove the intent to defraud, beyond a reasonable doubt, and it is for you, the jury, to determine from all the evidence whether or not the defendants, or any of them, *made or authorized* the making of any false representations or promises, whether or not such false representations and promises, if made, were known by the defendants to be untrue, or were made with reckless indifference as to whether the representations were true or false.

If you should determine from the evidence, beyond a reasonable doubt, that some one or more of the representations alleged in the indictment were made and were false, and that they were made by employees of the defendants or of companies which the defendants owned or controlled, those false representations are chargeable to the employers if you also find from the evidence, beyond a reasonable doubt, that the misrepresentations were expressly or impliedly authorized by the employers, or that the employers participated in, counsel or approved what the employees were doing, or if the employers commanded, aided or abetted or encouraged the employees to make the misrepresentations. But if you find that representations made by employees were not authorized or condoned by the defendants and that the defendants, or any of them, did not

participate in the representations made by employees, then the representations are not changeable to the defendants.

12/8/60

REFUSED AS TENDERED

HATFIELD CHILSON
JUDGE

INSTRUCTION NO. 3

The burden is on the government to prove the charges against each of the defendants beyond a reasonable doubt. Evidence which creates a mere suspicion of guilt cannot meet this burden and is not sufficient to sustain a verdict of guilt.

A reasonable doubt is that doubt which a reasonable, fair-minded person might honestly have after hearing all the evidence. If all the substantial evidence, taken together, is as consistent with innocence as it is with guilt, there is a "reasonable doubt" and you should find the defendant innocent. It is only when all the substantial evidence is consistent only with guilt that a finding of guilty can be sustained. Where all of the substantial evidence is as consistent with innocence as with guilt, a conviction can not be sustained.

Gold v. U. S. 36 F. 2nd 16
Turinetti v. U. S. 2 F. 2nd 15
Grantello v. U. S. 3 F. 2nd 117
Edwards v. U. S. 7 F 2nd 357
Bishop v. U. S. 16 F 2nd 410
Dickerson v. U. S. 18 F 2nd 887
Van Gorder v. U. S. 21 F 2nd 939

Salinger v. U. S. 23 F 2nd 48
Gerson v. U. S. 25 F 2nd 49
Philyaw v. U. S. 29 F 2nd 225
Eierman v. U. S. 46 F 2nd 46 (CCA 10th) (1930)
Leslie v. U. S. 43 F 2nd 288 (CCA 10th)

Evidence which creates a mere suspicion of guilt is not sufficient to sustain a verdict of guilt.
Thomas v. U. S. 239 F 2nd 7 (CCA 10th) (1956)

12/8/60

REFUSED AS TENDERED

HATFIELD CHILSON
JUDGE

INSTRUCTION NO. 4

The fact that a plan proves to be impracticable does not make it a scheme to defraud. Impracticability of the scheme is not alone sufficient to convict a person of having devised a scheme to defraud. However impracticable a scheme may have been, the use of the mails to execute it does not constitute a crime, if it was devised in good faith.

Turner v. U. S. 32 F 2nd 126
Kaufman v. U. S. 282 F. 776 260 U. S. 735
Sandals v. U. S. 213 F. 569

12/8/60

REFUSED

HATFIELD CHILSON
Judge

INSTRUCTION NO. 5

A participant may withdraw from a plan or scheme, but it requires affirmative and effective action thus to withdraw and terminate responsibility in connection therewith, and a defendant asserting his withdrawal from a plan or scheme must satisfy you that he did in fact sever his participation in the enterprise. Withdrawal is a question of fact and you should determine this question in the light of all the circumstances surrounding the asserted withdrawal. The person withdrawing must give notice to the others in his group of his purpose to abandon the enterprise and must thereafter have no active part in the enterprise or in making decisions regarding it.

A withdrawal from an unlawful plan or scheme does not absolve the person so withdrawing from liability for criminal acts, if any, which were directly the result of his participation in the plan or scheme up to the time of his withdrawal.

The question of withdrawal should not be confused with a situation where the question is whether a person ever becomes a member of an unlawful conspiracy. A group of persons may get together and pursue a plan which is completely lawful and later one of the persons may separate himself from the group. If, after his separation from the group, the plan develops along unlawful lines, the question is not whether the person who left the

group withdrew from an unlawful conspiracy but it, rather, whether he ever was a member of an unlawful conspiracy.

12/8/60

REFUSED AS TENDERED

HATFIELD CHILSON
Judge

INSTRUCTION NO. 6

The fact that a defendant made honest disclosures of information to the postal authorities during the investigation is a circumstance which has a bearing on the defendant's intentions, and this is especially true where the disclosures are volunteered by the defendant.

U. S. v. Brandt 196 F 2nd 653
U. S. v. Littlejohn 96 F. 2nd 368

12/8/60

REFUSED

HATFIELD CHILSON.
JUDGE

INSTRUCTION NO. 7

There has been testimony in this case that some of the defendants consulted with a lawyer before proceeding with the plan which they had.

In determining whether the defendants acted in good faith, the fact that they acted under advice of a lawyer is to be considered togther with other facts. While legal

advice is not an absolute defense to a charge of mail fraud, the obtaining of such advice is a circumstance which, along with other facts, indicates the intentions of the parties seeking it.

Linden v. U. S. 254 F 2nd 560.

12/8/60

REFUSED

HATFIELD CHILSON
Judge

DEFENDANTS' INSTRUCTION NO. 8

It is the contention of the defense that the defendants and each of them separately acted in good faith and with an honest belief in the enterprise in which they engaged. You are instructed that good faith is a complete defense to the crimes alleged in the indictment. If you find that the defendants or any of them did organize or participate in and carry out the business of California Sportswear Corp. in good faith and honestly believed the representations concerning that enterprise which they made or authorized to be made or had knowledge of, then it is your duty to find the defendants, or any of them who conducted themselves in good faith, not guilty.

12/8/60

REFUSED

HATFIELD CHILSON
Judge

DEFENDANTS' INSTRUCTION 9

The acts and statements of any one or more of the defendants outside the presence of any other defendant cannot be used against any other defendant to prove the charge of conspiracy unless and until other competent evidence has established his participation in the alleged unlawful conspiracy. In other words, before you can hold one defendant responsible for the acts and statements of his co-defendants you must find that he participated in the alleged unlawful conspiracy.

12/8/60

REFUSED

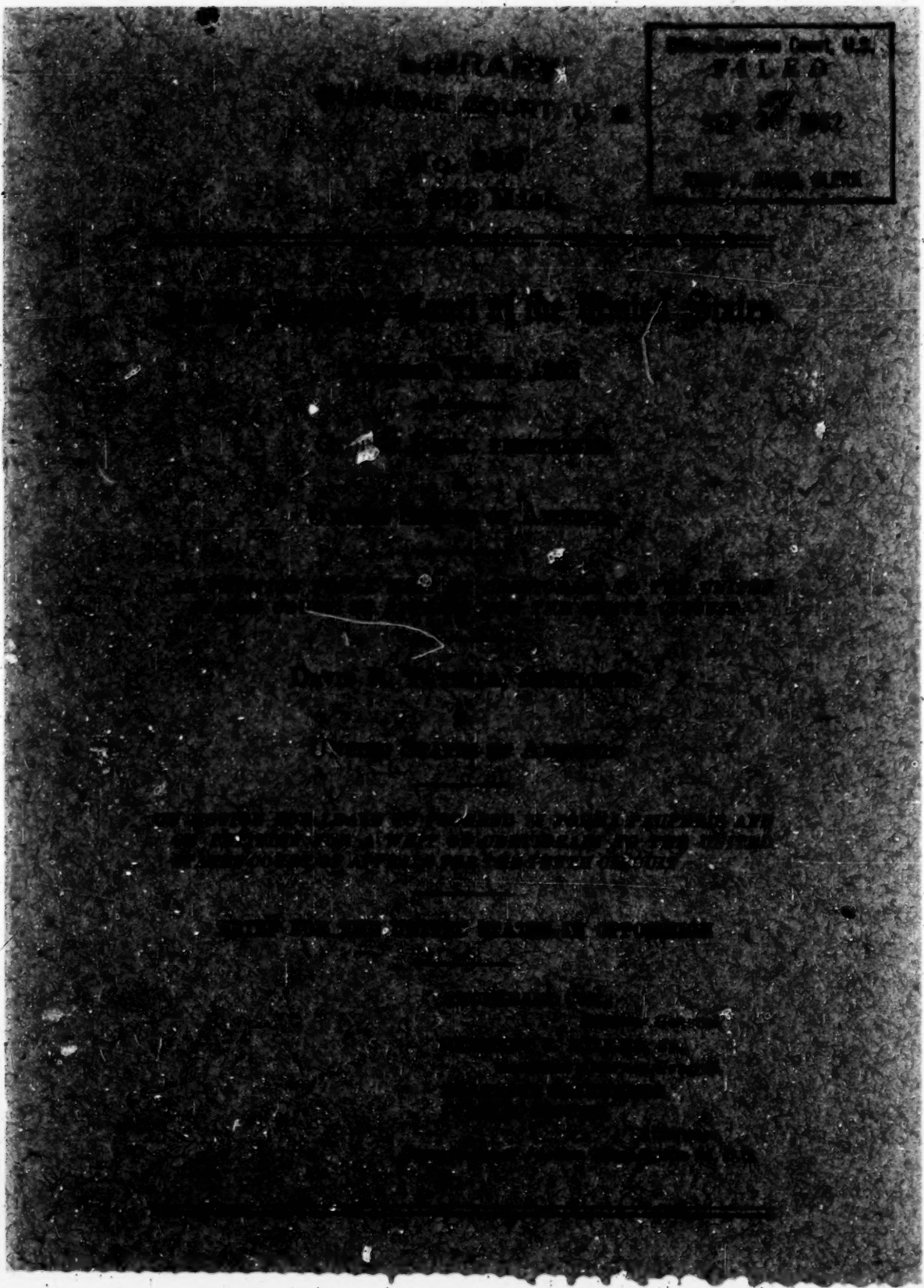
HATFIELD CHILSON
JUDGE

DEFENDANTS' INSTRUCTION 10

If any of the defendants made promises and predictions of future events which were glowing, spectacular and grandiose, the test is whether or not he believed them at the time they were made. If he believed them at the time they were made, they were not fraudulent, but if he believed in his own mind that they would not materialize, or if they were made recklessly without knowledge of the facts and with intent to deceive, then the representations were fraudulent.

12/8/60

HATFIELD CHILSON
Judge



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659496—62

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1962. Petitions for rehearing were denied on June 21, 1962. On July 16, 1962, Mr. Justice White extended the time for filing petitions for writs of certiorari to and including August 20, 1962, and the petitions were filed on August 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court erred in refusing to give requested instructions.

STATEMENT

In an indictment returned in the United States District Court for the District of Colorado, petitioners and others were charged in twelve counts with using the mails to defraud and in one count with conspiring to use the mails to defraud. After trial by jury of petitioners and one co-defendant, petitioner Beck was convicted on the first four substantive counts and acquitted as to all other counts. Petitioner Tuthill was convicted on all twelve substantive counts and acquitted on the conspiracy count. Beck was sentenced to imprisonment for a period of eighteen months on each of counts 1, 2 and 3, the terms to run concurrently, and the imposition of sentence on count 4 was suspended. Tuthill was sentenced to imprisonment for a period of eighteen months on each of counts 1 through 11, the terms to run concurrently, and the imposition of sentence on count 12 was suspended. The court of appeals affirmed the convictions.

1. *The scheme and the evidence:*

The scheme charged in the indictment was, in essence, the sale of knitting machines under false representations designed to create the impression that the company selling the machines was guaranteeing employment. The company inserted "help-wanted" advertisements in publications, falsely representing that it was primarily a wholesaler and jobber of knitted garments with a large expanding market for such garments; that it needed employees to work at home; that the limited number of women selected for this employment could make from $10-$50 profit per week for 15 hours of work and that the profits from 4–5 hours of work per week would meet the monthly payments on the knitting machines.

The evidence showed that in 1957 Beck, who had since 1952 been the exclusive importer of knitting machines, joined Tuthill in organizing California Sportswear Corporation of Colorado. Beck became president and Tuthill secretary-treasurer. Beck, who imported the machines at a cost of $43 each, supplied them for $80 to the corporation (Tr. 1107), which in turn sold them for $350. In 1957 Beck relinquished the presidency to Tuthill but remained as vice-president and major stockholder. In January 1958, Beck took a trip to Europe, where he spent most of his time at the factory which manufactured the knitting machines, corresponding meanwhile with Tuthill about the operation of the corporation. In May 1958, he returned to this country, resigned as vice-president, and in June sold the stock. Through a privately owned company, Beck continued to supply

the corporation with the knitting machines and, as before, received a substantial profit (see Tr. 1093-1149, 1209-1211).

The testimony of the purchasers, most of them married women with small children, followed a uniform pattern. Answering help-wanted advertisements,[1] they contacted an officer or agent, who represented that the company was a leading wholesale distributor of knitwear interested not in selling machines but in employing women to make garments at home (Tr. 40–41, 100, 130, 268–269, 328, 376-378, 622, 642, 715, 742, 804, 962); that it had a backlog of orders or large contracts to supply knitwear (Tr. 129, 269, 378, 672, 820, 899); that it would supply yarn at cost; and that the knitters, by selling garments back to the company, could easily realize profits variously quoted as between 20 and 80 dollars a week (Tr. 41, 186, 236, 273, 292, 464, 486, 508, 547, 898). The husband was asked to be present at the initial interview, and both wife and husband were ultimately induced to sign a chattel mortgage securing the purchase price of a machine, a matter broached last in the conversation (Tr. 269, 486, 578, 641–642, 625, 678–679, 742, 808). A few of the witnesses testified that they did not

[1] An advertisement in the Denver Catholic Register on September 18, 1958 (Gov. Ex. 10), read as follows:

"Help wanted—Female. Housewives to work at home, we need 7 responsible ladies to earn money working in their homes, no canvassing, no selling, no telephoning. Piece work. Must have at least 15 free hours per week. ABSOLUTELY NOTHING TO BUY. Write Box 3586, Santa Fe Drive, Denver 4, Sending Phone Number.

realize they were signing a chattel mortgage on their possessions (Tr. 466, 699–700, 711, 755), were told that the mortgage was "just a formality" (Tr. 382) and first became aware of the financing when they received a book from the finance company through the mail (Tr. 382, 606). Without exception the witnesses, many of whom expended long hours and great effort in this project, testified that they realized little or no profit (Tr. 138, 177, 196, 239–242, 280, 450, 471, 611) and were unable to pay from their receipts even the monthly notes of $18.25 on the purchase price of the machines, as they had been assured would be possible. To give only one example, a witness said that she used the machine all day and half the night without stopping for lunch, but eventually had to get an outside job to pay for the machine (Tr. 322–323). The witnesses uniformly testified that it took longer to make each of the items than had been represented,[2] and that the company often did not have yarn available (Tr. 86, 108, 195, 207, 442). Some testified that the company occasionally refused to accept garments (Tr. 108, 137, 175–176, 442) and, by selecting only garments that were difficult or time-consuming or unprofitable to produce, made it impossible for the knitters to make appreciable earnings.

Several of these purchasers testified that they were interviewed by petitioner Tuthill (Tr. 127, 265–269, 328, 963). While only two testified that they were personally interviewed by petitioner Beck (Tr. 39,

[2] One of the few males purchasing the machine testified that he was a research engineer at a university, that he tested the machine and that it was physically impossible to knit an item in the time represented (Tr. 824).

192), at least eight bought their machines in 1957 at a time when Beck was president of the company and at least two had been introduced to him (Tr. 127, 155, 184, 233, 265, 327, 373, 451, 619, 667).

Six salesmen were called by the government. They testified that they followed generally the "Home Sales Pitch", a sales presentation supplied and also followed by Beck (Tr. 1148). One salesman was employed by Beck and Tuthill in 1957; the others by Tuthill in 1958 and 1959. One heard Beck giving instructions at sales meetings (See Tr. 228, 210–232, 257–262, 526–541, 658–672, 918–936, 949–959).

The evidence showed that the only outlets for the sale of the knitted garments were neighborhood variety or individual drug or grocery stores (See Tr. 1015–1016). Petitioners admitted that they did not have national accounts or a written contract for supplying such garments; they said they had used high school boys as door-to-door salesmen (Tr. 1194–1202; 1206–1207; 1427–1428). The prices at which they sold to the individual stores were less than those paid to the home knitters for the same garments (Tr. 1018–1428).

2. *The defense:*

Petitioners, by their own testimony, endeavored to show that they had acted in good faith and had attempted to find outlets for the garments and to profit from the business experience of an operation in Detroit, from which the idea of combining sales of machines and sales of garments had been taken (Tr. 1093–1224; 1226–1432).

Nine purchasers, a salesman and an attorney testified for the defense.[3]

3. *The instructions:*

In its instructions, the court, noting that the defendants had entered pleas of not guilty, told the jury that "the defendants deny the making of false representations as alleged in the indictment, and deny that they used the mails with intent to defraud, but contend in all respects that they acted honestly and in good faith" (I. 4).[4] The court then explained at length each of the counts of the indictment and the necessary elements of each offense (I. 5–22). Instructing as to the burden of the government to show false representations which were chargeable to the defendants, the court said (I. 22–23):

> * * * It is necessary that the Government prove beyond a reasonable doubt as to each defendant and as to each count that a false representation or promise was made with intent to defraud during the period of time each defendant was chargeable as being a participant in the scheme or plan or the conspiracy.
>
> One who makes false representations or

[3] Of the purchasers, who generally expressed satisfaction with the working arrangement, two had worked as salaried employees of the company, two had bought the machine for personal reasons not connected with employment and two had made previous statements directly contradictory to their testimony at trial (See Tr. 1470 et seq.) The attorney testified that while he had given advice as to the legality of the venture, the nature of his work for petitioners was primarily corporate and that he had never been shown copies of the "Home Sales Pitch" or "Home Presentation" documents (Tr. 1438–1450).

[4] "I." refers to the transcript of the court's instructions.

promises, not knowing whether they be true or false, and with reckless indifference as to whether they are true or false, may be considered by you to have been knowingly falsely made.

The burden of proof is upon the Government to prove beyond a reasonable doubt that one or more of the representations or promises set forth in the indictment were in fact false, and that they were known by the defendants to be untrue at the time they were made; or that false representations and promises were made with reckless indifference as to whether the representations or promises were true or false.

If you should determine from the evidence beyond a reasonable doubt that some one or more of the representations alleged in the indictment were made and were false, and that they were made by employees of the defendants or of companies which the defendants owned or controlled—that really, in this case, should be or of a company which the defendants owned or controlled—those false representations are chargeable to the employers if you also find from the evidence beyond a reasonable doubt that the misrepresentations were expressly or impliedly authorized by the employers, or that the employers participated in, counselled or approved what the employees were doing, or if the employers commanded, aided, or abetted or encouraged the employees to make the misrepresentations.

The court explained that the purpose of the use of the word "knowingly" in the charge was to insure that no one would be convicted for an act done because

of mistake or inadvertence or other innocent reasons (I. 24). It explained that an act was done willfully if "done voluntarily and purposely and with a specific intent to do that which the law forbids; that is to say, with evil motive or bad purpose, either to disobey or disregard the law" (I. 24). After defining the word "unlawfully" it continued (I. 25):

> You will also note that the acts charged in the indictment are alleged to have been done with intent to defraud. To act with intent to defraud means to act knowingly and with the specific intent to deceive for the purpose of either causing some financial loss to another or bringing about some financial gain to oneself.
>
> An essential element of all the offenses here charged is an intent to defraud. And this intent must be established by the evidence beyond a reasonable doubt.
>
> "Intent" as used here, means that the defendants must have had the purpose or willingness to defraud. A person is presumed to intend that which he voluntarily and wilfully does and to intend all the natural, probable and usual consequences of his act and conduct.

The court also instructed on the presumption of innocence, cautioned that the government must prove every material element of the offenses beyond a reasonable doubt, and said that, in the event of such doubt, the jury's duty would be to resolve it in favor of the defendant and to acquit him (I. 26).

At the conclusion of the instructions, petitioners excepted on the ground that the statement as to good faith was insufficient to show the theory of the defense. They also excepted to the refusal of the

court to give instructions which they proffered (I. 30, 31; see Pet. No. 350, App. C,). The requested instructions would have specifically told the jury that it must acquit if it found that the defendants acted in good faith, that consultation with the attorney could be considered on the issue of good faith and that representations not authorized or ratified by petitioners were not chargeable to them. Petitioner Beck also sought an instruction elaborating on the matter of withdrawal from the scheme or conspiracy.[5]

ARGUMENT

1. Petitioners' claim that their theory of the defense was not adequately presented to the jury is amply refuted by the summary of the instructions, *supra*. The jury was explicitly told that the defendants denied making false representations or having had intent to defraud, and that they contended they had acted honestly and in good faith. When read in the context of the charge as a whole, this instruction was adequate to present the proffered defense. The jury was told that the government must prove not only that the representations were false, but also that defendants knew them to be false or else made them with reckless indifference to their truth or falsity. The judge defined "intent to defraud" and instructed that such intent was an essential element of the offense which had to be proved beyond a reasonable doubt. The jury was also told that in the event any material element was not proved beyond a reasonable doubt, it

[5] As to the court's instruction relative to withdrawal from a conspiracy, see I. 21.

had the duty to acquit. Thus, the jury was adequately instructed that petitioners could not be convicted unless the jury found that by making knowingly false representations they acted wilfully, with intent to deceive. Taken as a whole, the charge fairly presented the issue of good faith. See *Boyd* v. *United States*, 271 U.S. 104; *Walters* v. *United States*, 256 F. 2d 840 (C.A. 9), certiorari denied, 358 U.S. 833. See also *Reistroffer* v. *United States*, 258 F. 2d 379 (C.A. 8), certiorari denied, 358 U.S. 927.

It was unnecessary to give more particularized instructions on the theory of the defense in this case because, in the circumstances here, petitioners' claim of good faith was essentially nothing more than a general denial of an intention to deceive. In contrast to the cases on which petitioners rely,[6] this case did not involve some specific limited theory on which petitioners predicated an affirmative defense, but merely a general denial of intent to defraud. True, petitioners requested an instruction that consultation with an attorney should be considered on the issue of

[6] *E.g.*, in *Bird* v. *United States*, 180 U.S. 356, the issue of self-defense in a murder case was not adequately put before the jury. *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 410, and *Pierce* v. *United States*, 314 U.S. 306, involved factual determinations, which could have placed the defendants beyond the reach of the statute. *Levine* v. *United States*, 261 F. 2d 747 (C.A.D.C.) was a false personation case where the defendant testified that he did not represent himself to be a police officer as charged but rather an "officer of the court". See *United States* v. *Pihakis*, 224 F. 2d 898 (C.A. 3), where the instructions given were confusing. In *Coleman* v. *United States*, 167 F. 2d 837 (C.A. 5), there was a much more specific factual basis for the claim of good faith and the main part of the charge was confusing.

good faith, but that request was properly refused as unsupported by the evidence, inasmuch as the attorney's testimony showed that he was not consulted on the sales representation. And requested instruction No. 10 (Pet. 350, p. 55)—that defendants' promises, although glowing and grandiose, were not fraudulent if defendants believed they would materialize—was adequately covered in the judge's charge that in order to convict, the jury had to find that the representations were not only false, but known by the defendants to be false. In short, the so-called affirmative defense in this case was merely a negation of the government charges and did not require separate charges beyond those given.

2. Petitioner Beck also complains that the trial court improperly refused to instruct the jury to disregard all evidence which had not been connected to him by evidence of authorization or ratification, and that the court also improperly refused to instruct as to withdrawal from the scheme. The court instructed that the false representations were chargeable to the employers if the jury could find from the evidence beyond a reasonable doubt that the misrepresentations were expressly or implicitly authorized by the employers, or that the employers participated in, counselled or approved what the employees were doing, or if the employers recommended, aided or abetted or encouraged the employees to make the misrepresentations. It instructed that the government must prove that the false representation or promise was made with intent to defraud during the period of time for which each defendant was chargeable with participa-

tion in the scheme or plan or conspiracy. The jury acquitted the petitioner Beck on all counts except those with respect to which the evidence clearly showed him to be an officer, stockholder and participant working in the interest of the corporation. Petitioner's conviction on any one of the first three counts (the first two of which charge offenses committed in September or October 1957 when he was admittedly the salaried president) will support his eighteen-month prison sentence.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 350

GORDON BECK, Petitioner,

vs.

UNITED STATES OF AMERICA

MEMORANDUM IN REPLY

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IN THE

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October Term, 1962

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GEORGE BECK, Petitioner,

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UNITED STATES OF AMERICA

MEMORANDUM IN REPLY

The Solicitor General filed a brief in opposition to the petition for certiorari under Rule 24(1) of this Court's Rules of Practice which permits such briefs to show some "matter or ground why the cause should not be reviewed by this court". It is respectfully submitted that not only does the brief in opposition fail to comply with the direction of this Rule, it actually misrepresents both the facts of record and the applicable law to such an unprecedented extent that Petitioner, reluctantly, is

compelled to attempt clarification by means of this Reply.* We, therefore, earnestly invite the Court's attention to the following points:

I. *The Government has misrepresented the legal question and mis-stated the applicable law in an attempt to uphold this conviction.*

The petitioner is seeking certiorari because of a firm conviction that in this case the lower courts departed from the established rules of law governing defense instructions. In the petition, it was pointed out that this case falls squarely within the rule established by this Court in *Bird vs. United States*, 180 U. S. 356, and followed for many years by the lower courts, *viz.*, that, if there is believable substantiating evidence of record, a defendant is entitled to a separate and clear instruction on the legal validity of a claimed defense. Petitioner firmly believes that the lower courts' refusal to permit such instructions in this case deprived him of the fair trial guaranteed by the United States Constitution.

The brief in opposition takes the position that the question in this case is whether the instructions covering the elements of the offense "fairly presented" the defenses raised by the petitioner (Br. in Op. 10-11). Even the most casual reading of the petition in this case reveals that the petitioner is relying upon the rule established in the *Bird* case, *supra*; and, any reading at all of the *Bird* case reveals that this Court there held that it makes no

*The brief in opposition was also untimely. The Rules allow a respondent 30 days after receipt of a petition in which to file a brief in opposition. The petition here was served and filed on August 18, 1962. The brief in opposition was filed on September 27, 1962 — some 40 days later.

difference how clearly the elements of an offense are stated in the instructions, if the defendant claims a valid defense and offers a proper instruction, the trial court must give such instruction or be reversed. "It is well settled that the defendant has a right to a full statement of law from the court * * *." *Bird vs. United States, supra* at page 361. One is left to wonder why the Solicitor General thus ignores the legal question presented in this case.

Perhaps, more surprising than the mis-statement of the question, is the patent mis-statement of the holding of the *Bird* case itself. When this case is finally discussed in the brief in opposition (p. 11) it is dismissed as one of a series involving "some specific limited theory" on which an "affirmative defense" was predicated. The brief does not explain how the plea of self-defense in *Bird* falls in this class nor, indeed, does it teach the reader how to distinguish between a "specific limited theory" and the "general denial of intent", which it says is involved here. Moreover, in the only comment on the *Bird* case (in a footnote (Br. in Op. p. 11)), the Solicitor General's opposition states "the issue of self-defense in a murder case was not adequately put before the jury". We invite the Court's appraisal of the instruction given in the *Bird* case (180 U. S. at 361):

> "The court instructs the jury, if they believe from the evidence beyond a reasonable doubt that the defendant * * * shot and killed one J. H. Hurlin, and that said killing was malicious, premeditated and willful, *and that said killing was not in the necessary defense of the defendant's life or to prevent the infliction upon him of great bodily harm*, then it is your

duty to find the defendant guilty as charged in the indictment." (Emphasis supplied.)

As detailed in the Petition (p. 11), this Court held that the failure to give a tendered defense instruction on self-defense was reversible error. We can only invite attention to the double standard which allows the Solicitor General to conclude that the above instruction did not adequately present the issue of self-defense, while the instructions in this case (certainly less direct and to the point on defenses) "fairly presented" the defenses claimed (B. in Op. 11). This is the same dichotomous approach to the controlling law which impelled the application for certiorari in the first place. The point is that either the rule of the *Bird* case is right or it is wrong; and this is an important federal question which should be decided and not swept under the rug.

II. The Brief in Opposition grossly mis-states the facts and the evidence.

The brief filed by the Government in opposition to the petition is a transparent attempt to becloud the real issue raised by the petition by placing emphasis upon a review of the record under the heading "The Scheme and the Evidence". This recitation of evidentiary facts is not only foreign to the actual legal question raised by the petition, but is so grossly inaccurate, prejudiced and unfair as to demand reply and correction. Significantly, the statement is not taken from the opinion of the Court of Appeals, but purports to come directly from the voluminous record. Whether this is because the Government feels the Court of Appeals' statement of the case is inaccurate and incom-

plete so by because of a desire to create a more extensive aura of guilt around the petitioner is open to speculation. In either event, this recitation of "facts" contains carefully selected references to the testimony which are misleading without consideration of other testimony in the trial (either testimony from other witnesses or qualification through cross-examination), and which, in some instances, are completely inaccurate.

Without belaboring the point and only to highlight the prejudiced and unfair presentation made in the Government's brief, the following are some of the more obvious misrepresentations of the record in the Government's "summary":

1. The Government's brief (p. 3) states that "the company inserted 'help-wanted' advertisements in publications, falsely representing that it was primarily a wholesaler and jobber of knitted garments with a large expanding market for such garments". No record reference is given for this statement and there is nothing anywhere in the record, either in the testimony of witnesses or in the numerous copies of advertisements submitted by the Government as Exhibits in the trial, to substantiate the statement.

2. The Government's brief (p. 3) states that "in 1957, Beck relinquished the presidency to Tuthill, but remained as vice president and major stockholder". The testimony clearly shows that in December, 1957, Beck transferred stock to Tuthill, resulting in a major stock ownership by Tuthill and only a minority interest by Beck (T. 1131, 1259). While the petitioner contends that the percentage of stock ownership is not a relevant issue in this proceed-

ing, it is apparent that the misrepresentation in the Government's brief was intended to bolster the position previously taken by the Government that some vicarious criminal liability attaches to the petitioner because he was a stockholder.

3. The Government's brief (p. 3, 4) states that after Beck severed his relationship with the company, he continued to supply knitting machines and "received a substantial profit." Again, although petitioner contends that the element of profit is not relevant, the facts of the matter are that the uncontroverted testimony shows that rather than making any profit, Beck actually lost $17,200.00 as a result of sales of knitting machines to the company (T. 1221-1223).

4. The Government's brief (p. 4, 5) represents that witnesses testified that they did not realize they were signing chattel mortgages on their possessions. The record references in the Government's brief reflect only self-serving gratuitous statements made on direct examination and do not refer to qualifying testimony of the same witnesses developed on cross-examination (T. 478-479, 701, 762-763, 422, 621-613).

5. The Government's brief (p. 5, fn. 2) represents that a research engineer tested the knitting machines sold by the petitioner and found that it was physically impossible to knit an item in the time represented. The testimony of this witness was thoroughly discredited upon cross-examination when it was revealed that the alleged test which he conducted was not conducted in a scientific manner, although the witness claimed to be a research engineer, and that it failed to take into account time-saving

techniques which would have been known to a competent operator. (T. 838-842).

6. The Government's brief (p. 5) represents that the testimony showed that the company occasionally refused to accept the garments, but does not explain that such refusal related to garments which had been made contrary to the company's instructions and garments which were improperly made so that they could not be sold (T. 108, 137, 175-176, 442).

7. The Government's brief (p. 6) refers to the fact that the testimony showed that Beck gave instructions at sales meetings, but no reference is made to testimony showing that such instruction was to the effect that representations made by salesmen should be confined to truthful representations concerning the knitting machines and the company's program (T. 930-935, 1511, 1512, 1516, 1517).

8. The Government's brief (p. 6) reflects that the evidence showed that "the only outlets for the sale of the knitted garments were neighborhood variety or individual drug or grocery stores". This statement is directly contradictory to the uncontroverted evidence that garments were placed by the petitioner in the Denver Dry Goods Company and Joslins' (two of the largest department stores in the City of Denver) and in the Woolworth and Walgreen stores in Denver (T. 537, 549, 1117, 1120).

CONCLUSION

The misrepresentation of the record, the calculated avoidance of the legal issue and the mis-statement of the holding of this Court in the primary case on which petitioner relies, all point to the conclusion that the Brief in Opposition discloses no reason whatever why certiorari should not be granted. Indeed, the Government's approach seems to be to uphold this conviction at all costs and to avoid the establishment of clear rules defining a defendant's rights to jury instructions on his legal theory of defense. This attempt by the United States to confirm the litigating advantage given the prosecution by the courts below is itself an additional reason for immediate action by this Court.

It is respectfully submitted that, for the reasons set forth in the Petition, the petition for certiorari should be granted.

Respectfully submitted,

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